Docket for 04-340

(26)

No. 04-340
Title: San Remo Hotel, L.P., et al., Petitioners
v.
City and County of San Francisco, California, et al.
Docketed: September 10, 2004
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (03-15853)
Decision Date: April 14, 2004
Rehearing Denied: June 9, 2004
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Sep 7 2004	Petition for a writ of certiorari filed. (Response due October 12, 2004)
Sep 15 2004	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the petitioners and counsel for the respondents.
Oct 5 2004	Order extending time to file response to petition to and including November 12, 2004.
Nov 12 2004	Brief amici curiae of Washington Legal Foundation, et al. filed.
Nov 12 2004	Brief amicus curiae of National Association of Home Builders filed.
Nov 12 2004	Brief of respondents City and County of San Francisco, California, et al. in opposition filed.
Nov 12 2004	Brief amici curiae of Pacific Legal Foundation, et al. filed.
Nov 23 2004	DISTRIBUTED for Conference of December 10, 2004.
Nov 30 2004	Reply of petitioners San Remo Hotel, L.P., Thomas Field, Robert Field, and T & R Investment Corp. filed. (Distributed)
Dec 10 2004	Petition GRANTED limited to Question 1 presented by the petition for certiorari.
Jan 17 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners.
Jan 18 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the respondents.
Jan 19 2005	SET FOR ARGUMENT ON Monday, March 28, 2005
Jan 24 2005	Brief amicus curiae of National Association of Home Builders filed.
Jan 24 2005	Brief amici curiae of Evandro S. Santini, et al. filed.
Jan 24 2005	Brief amicus curiae of Steve Chabot filed.
Jan 24 2005	Joint appendix filed.
Jan 24 2005	Brief of petitioner San Remo Hotel L.P., Thomas Field, Robert Field, and T&R Investment Corp. filed.
Jan 24 2005	Brief amici curiae of Pacific Legal Foundation, et al. filed.
Jan 24 2005	Brief amici curiae of Equity Lifestyle Properties, Inc., et al. filed.
Jan 24 2005	Brief amici curiae of Defender of Property Rights and New England Legal Foundation filed.
Jan 24 2005	Brief amici curiae of Washington Legal Foundation, et al. filed.
Jan 24 2005	Brief amicus curiae of Franklin P. Kotschade filed.
Jan 24 2005	Brief amici curiae of Elizabeth J. Neumont, et al. filed.
Feb 4 2005	CIRCULATED.

Feb 22 2005	Extension of time to file respondents' brief on the merits to and including March 1, 2005.
Mar 1 2005	Brief of respondents City and County of San Francisco, California, et al. filed. (Distributed)
Mar 1 2005	Brief amici curiae of National Association of Counties, et al. filed. (Distributed)
Mar 1 2005	Brief amici curiae of New Jersey, et al. filed. (Distributed)
Mar 1 2005	Brief amicus curiae of Conference of Chief Justices filed. (Distributed)
Mar 1 2005	Brief amici curiae of Community Rights Counsel, et al. (Distributed)
Mar 1 2005	Brief amici curiae of New York, Connecticut,and Vermont filed. (Distributed)
Mar 8 2005	Record received from U.S.C.A. 9th Circuit. (1 box)
Mar 16 2005	Record received from U.S.D.C. for the Northern District of California. (2 boxes)
Mar 21 2005	Reply of petitioners San Remo Hotel, L.P., et al. filed. (Distributed)
Mar 28 2005	Argued. For petitioners: Paul Utrecht, San Francisco, Cal. For respondents: Seth P. Waxman, Washington, D.C.

(1) Supreme Court, U.S.
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No. 0

In the Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T&R INVESTMENT CORP.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The City and County of San Francisco adopted an ordinance that prohibited hotels from continuing their historic, duly-licensed operation as hotels, but allowed hotel owners to avoid those restrictions by paying an exaction. Petitioners brought this action challenging the exaction based on the Takings Clause of the Fifth Amendment and 42 U.S.C. § 1983. The United States Court of Appeals for the Ninth Circuit initially refused to reach the merits of the constitutional challenge, finding that petitioners were required to ripen their claim by seeking compensation in state court under *Williamson County Planning Commission v. Hamilton Bank of Johnson City*. Once the claim was ripe, the Ninth Circuit again refused to reach the merits of the constitutional challenge, finding that the claim was barred by issue preclusion. In reaching that conclusion, the Ninth Circuit held that the California Supreme Courts' refusal to apply heightened scrutiny to legislative exactions under state law is consistent with federal Takings law. The questions presented are:

1. Is a Fifth Amendment Takings claim barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim?

2. Is deferential scrutiny, akin to the rational basis test, appropriate for exactions imposed by legislation even though exactions imposed by administrative adjudications are subject to heightened scrutiny under *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties are set forth in the caption. T&R Investment Corporation does not have a parent corporation. No publicly held company owns any interest in T&R Investment Corporation or San Remo Hotel, L.P.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding and Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions at Issue 2

Statement of the Case 2

A. Statement of Facts 2

B. Procedural History 4

Reasons the Petition Should be Granted 6

I. THE NINTH CIRCUIT'S DECISION SQUARELY CONFLICTS WITH THE SECOND CIRCUIT AND CREATES A TRAP THAT PRECLUDES ALL FEDERAL COURTS FROM REVIEWING THE MERITS OF FEDERAL TAKINGS CLAIMS 6

II. THERE IS A NATIONWIDE SPLIT OF AUTHORITY ON WHETHER EXACTIONS IMPOSED BY LEGISLATION ARE SUBJECT TO HEIGHTENED SCRUTINY 10

Conclusion 18

Appendix

Appendix A - Ninth Circuit Order Denying Petition for Rehearing *En Banc* - 6/9/04 . . . . . 1a

Appendix B - Ninth Circuit Opinion - 4/14/04 . . . . 3a

Appendix C - District Court Order - 4/16/03 . . . . 22a

Appendix D - District Court Order - 10/15/02 . . . 53a

Appendix E - Supreme Court of California Opinion - 3/4/02 . . . . . 106a

Appendix F - San Francisco Residential Hotel Unit Conversion and Demolition Ordinance 195a

TABLE OF AUTHORITIES

Cases

Armstrong v. United States, 364 U.S. 40 (1960) . . . 13

Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, 94 N.Y.2d 96, 721 N.E.2d 971 (1999) 14

Breneric Associates v. City of Del Mar, 69 Cal.App.4th 166, 81 Cal.Rptr.2d 324 (1998) . . . 9

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 14

City of Portsmouth v. Schlesinger, 57 F.3d 12 (1st Cir. 1995) 12

Dolan v. City of Tigard, 512 U.S. 374 (1994) . . . . . i, 10, 11, 14, 16

Ehrlich v. City of Culver City, 12 Cal.4th 854, 50 Cal.Rptr.2d 202 (1996) 17

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 8, 10

Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299 (11th Cir.1992) 7

Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275 (4th Cir. 1998) 7

Harris v. City of Wichita, 862 F.Supp. 287 (D. Kan. 1994), *aff'd*, 74 F.3d 1249 (10th Cir. 1996) . . . 12

Home Builders Ass'n v. City of Beavercreek, 89 Ohio St.3d 121, 729 N.E.2d 349 (2000) 12

Home Builders Ass'n v. City of Scottsdale, 187 Ariz. 479, 930 P.2d 993 (1997) 12

Jennings v. Caddo Parish School Bd., 531 F.3d 1331 (5th Cir. 1976) 7

Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687 (Colo. 2001) 12

Lambert v. City and County of San Francisco, 529 U.S. 1045, 120 S.Ct. 1549 (2000) 13

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 17

Melillo v. City of New Haven, 249 Conn. 138, 732 A.2d 133 (1999) 9

National Ass'n of Home Builders v. Chesterfield County, 907 F.Supp. 166 (E.D. Va. 1995), *aff'd* 92 F.3d 1180 (4th Cir. 1996) 12

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) . . . . . i, 11, 16, 17, 18

Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page, 165 Ill.2d 25, 649 N.E.2d 384 (1995) 12

Parking Ass'n of Georgia v. City of Atlanta, 264 Ga. 764, 450 S.E.2d 200 (1994) 11, 12

Peduto v. City of North Wildwood, 878 F.2d 725 (3d Cir. 1989) 7

Rogers Machinery, Inc. v. Washington County, 181 Or.App. 369, 45 P.3d 966 (2002) 12

San Remo Hotel v. City and County of San Francisco, 145 F.3d 1095 (9th Cir. 1998) (*San Remo I*) . . . 5

San Remo Hotel v. City and County of San Francisco, 27 Cal.4th 643, 41 P.3d 87, 117 Cal.Rptr.2d 269 (2002) (*San Remo II*) 5, 9, 14, 15, 17

San Remo Hotel, L.P. v. City and County of San Francisco, 364 F.3d 1088 (9th Cir. 2004) (*San Remo III*) 6, 7, 10, 15

San Remo Hotel v. City and County of San Francisco, 82 Cal.App.4th 1105, 100 Cal.Rptr.2d 1 (2002) 5

Santini v. Connecticut Hazardous Waste Management Service, 342 F.3d 118 (2003) 7, 8, 9, 10

Seawall Associates v. City of New York, 74 N.Y.2d 92, 542 N.E.2d 1059 (1989) 11, 13, 14, 18

Southeast Cass Water Resource Dist. v. Burlington Northern Railroad Co., 527 N.W.2d 884 (N.D. 1995) 12

Town of Flower Mound v. Stafford Estates Ltd., 47 Tex. Sup. Ct. J. 497, 135 S.W.3d 620 (2004) 11, 15

Trimen Development Co. v. King County, 124 Wash.2d 261, 877 P.2d 187 (1994) 12

Wilkinson v. Pitkin County Bd. of County Commissioners, 142 F.3d 1319 (10th Cir. 1998) 7

Williamson County Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) . . . . . *passim*

Constitutional and Statutory Provisions, Rules

U.S. Const. Fifth Amend. . . . . *passim*

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 i

San Francisco Residential Hotel Unit Conversion and Demolition Ordinance (HCO) 2

HCO § 41.3(m) 4
HCO § 41.4(n) 3
HCO § 41.4(q) 3
HCO § 41.13(a)(4) 4
HCO § 41.19(a)(3) 4
Fed. R. Civ. P. 12(b)(6) 2, 5
S. Ct. Rule 13.1 1

Other Authorities

Breemer, J. David, *Overcoming Williamson County's Troubling State Procedures Rule*, 18 J. Land Use & Envtl. L. 209 (2003) 6-7

Faus, Richard, *Exactions, Impact Fees, and Dedications – Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 Stetson L. Rev. 675 (2000) 11

Gunther, Gerald, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 Harv. L. Rev. 1 (1972) 12

Meacham, Madeline J., *The Williamson Trap*, 32 Urb. Law. 239 (2000) 6

PETITION FOR WRIT OF CERTIORARI

Petitioners San Remo Hotel L.P., Thomas Field, Robert Field, and T & R Investment Corp. pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on April 14, 2004.

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing en banc is unreported and is reproduced as Appendix (App.) A. The opinion of the Ninth Circuit is reported as *San Remo Hotel, L.P. v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004), and is reproduced as Appendix B. The orders of the United States District Court for the Northern District of California are unreported and reproduced as Appendices C and D. The opinion of the California Supreme Court is reported as *San Remo Hotel v. City and County of San Francisco*, 27 Cal.4th 643, 41 P.3d 87, 117 Cal.Rptr.2d 269 (2002), and is reproduced as Appendix E.

JURISDICTION

The opinion of the Ninth Circuit was filed and entered on April 14, 2004. App. B. The order of the Ninth Circuit denying the petition for rehearing en banc was entered on June 9, 2004. App. A. This petition for writ of certiorari is timely filed under Rule 13.1 of the Rules of the Supreme Court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation."

The Residential Hotel Unit Conversion and Demolition Ordinance adopted by the City and County of San Francisco, as codified at Chapter 41 of the San Francisco Administrative Code, is reproduced as Appendix F.

STATEMENT OF THE CASE

A. Statement of Facts[1]

The San Remo Hotel was built in 1906 and has been operated as a tourist hotel since the 1950s. Petitioners bought the San Remo Hotel in 1971 when it was fully-licensed as a tourist hotel. After petitioners restored the building in 1976, the City issued new permits and licenses that authorized unlimited tourist use of the hotel. Since then, the City has collected hotel taxes based on the tourist use of the hotel.

The City adopted the first version of the Residential Hotel Unit Conversion and Demolition Ordinance (HCO or Hotel Ordinance) in 1981, despite the City Attorney's advice that it was unconstitutional. Under the Hotel Ordinance, rooms

[1] This case was decided on a motion to dismiss under Fed.R.Civ.P. 12(b)(6); therefore, all of the facts alleged in the complaint are presumed true. This statement of facts is based on the operative complaint, which appears at pages 108-136 of the Excerpts of Record, filed in the Ninth Circuit on September 5, 2003.

were designated as residential units based on their use during a particular 32-day period: from August 22 to September 23, 1979. HCO § 41.4(n) and (q), App. F-202a, 203a. Thus, a room was designated as a residential unit if it was occupied by the same person during those 32 days in 1979, even if the room had never before been rented to a residential tenant.

The consequence of being designated a residential unit was that the room could only be rented to tourists on a daily basis during the tourist season from May 1 to September 30. During the rest of the year, only weekly or monthly rentals were allowed. The Hotel Ordinance allowed hotel owners to obtain a permit to rent the residential units to tourists year-round. But, that permit would be subject to a condition requiring the payment of a replacement housing fee or the creation of new residential units at another location either by construction of new units or rehabilitation of unusable units. The replacement housing fee was set at 40% of the cost of constructing replacement housing plus the site acquisition cost.

The San Remo Hotel's 62 rooms were mistakenly designated as residential units even though there were only 10 residential tenants. Nevertheless, petitioners (like many hotel owners) were able to continue their historical use as a primarily tourist hotel. As allowed by the Hotel Ordinance, petitioners rented the rooms to tourists during the tourist season, did not rent rooms on a daily basis during the rest of the year when there was little or no tourist business, and kept about 10 residential tenants year-round.

In 1990, the City adopted a new version of the Hotel Ordinance that severely restricted petitioners' operation of the hotel. The new ordinance reduced the allowed daily rental to tourists during the tourist season from 100% to 25% of the

designated residential units; prohibited even that 25% tourist use unless the rooms were rented to residents during the rest of the year (thereby subjecting those rooms to San Francisco's rent control ordinance, which severely restricts evictions); and doubled the replacement housing fee imposed on permits to escape the Hotel Ordinance's use restrictions. HCO §§ 41.13(a)(4), 41.19(a)(3), App. F-227a, 236a-237a. The Hotel Ordinance explicitly states that the City doubled the replacement housing fee from 40% to 80% of the cost of constructing new housing because adequate public funding was no longer available. HCO § 41.3(m), App. F-198a.

Because the 1990 Hotel Ordinance eliminated petitioners' right to continue the historical use of their hotel, they immediately applied for a permit to escape the new restrictions. Three years later, the San Francisco Planning Commission granted a permit for the San Remo Hotel, but imposed an exaction as a condition: Petitioners were required to pay the City an exaction of $567,000 under the Hotel Ordinance. Petitioners appealed that decision to the Board of Supervisors, which affirmed the Planning Commission's decision by a 6-5 vote. A dissenting Supervisor called the City's exaction "organized extortion."

B. Procedural History

In 1993, petitioners brought this federal court action to challenge the exaction imposed by the City. The district court issued a preliminary injunction, finding that the Hotel Ordinance was facially unconstitutional. Three years later, the district court granted the City's motion for summary judgment and dissolved the preliminary injunction.

Two years later, the Ninth Circuit held that petitioners' as-applied Takings claims were unripe because petitioners had not sought compensation in the state courts as required by *Williamson County Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998) (*San Remo I*).

Two years later, the California Court of Appeal reversed the state trial court's dismissal of the state law compensation claims, finding that heightened scrutiny applies to the exaction even though it was imposed by legislation. *San Remo Hotel v. City and County of San Francisco*, 82 Cal.App.4th 1105, 100 Cal.Rptr.2d 1, 9-11 (2002).

Two years later, the California Supreme Court reversed the state appellate court and rejected petitioners' state law claims for compensation in a 4-3 decision. *San Remo Hotel v. City and County of San Francisco*, 27 Cal.4th 643 (2002) (*San Remo II*), App. E. In particular, that court found that under the state constitution, there is no heightened scrutiny for exactions imposed by legislation. *San Remo II*, App. E-130a-144a. All seven justices agreed that the state court had not decided any federal question. *San Remo II*, App. E-107a, n.1, E-170a, E-194a.

One year later, the district court granted the City's motion to dismiss under Fed.R.Civ.P. 12(b)(6). The district court found that petitioners' federal Takings claims were barred by issue preclusion, based on the state supreme court decision, and the statute of limitations. App. C-50a-51a, C-85a, D-73a, D-90a.

Finally, eleven years after this action was filed, the Ninth Circuit affirmed the district court solely on the ground that

petitioners' claims were barred by issue preclusion, and did not reach the statute of limitations issue. *San Remo Hotel v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004) (*San Remo III*), App. B. The Ninth Circuit held that issue preclusion can bar federal Takings claims even though the state court proceedings were required to ripen those claims. App. B-12a-16a. Under the applicable state law rules of issue preclusion, petitioners' claims were barred only if the substantive federal Takings law is the same as California state compensation law. App. B-16a-17a. The Ninth Circuit held that the claims were barred by issue preclusion because federal law and state law are the same, i.e., there is no heightened scrutiny for exactions imposed by legislation. App. B-17a-21a.

REASONS THE PETITION SHOULD BE GRANTED

I. THE NINTH CIRCUIT'S DECISION SQUARELY CONFLICTS WITH THE SECOND CIRCUIT AND CREATES A TRAP THAT PRECLUDES ALL FEDERAL COURTS FROM REVIEWING THE MERITS OF FEDERAL TAKINGS CLAIMS

The practical effect of the Ninth Circuit's rule on issue preclusion, when combined with the ripeness requirement of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), is that federal Takings claims can never be considered on the merits in any federal court, including this Court. Indeed, one commentator has dubbed the Ninth Circuit's combination of ripeness and issue preclusion, "The *Williamson* Trap". Meacham, Madeline J., *The Williamson Trap*, 32 Urb. Law. 239 (2000). Moreover, this is not just a trap for the unwary, it is a "procedural snare that swallows the careful takings claimant as well as the unwary". Breemer, J. David,

Overcoming Williamson County's Troubling State Procedures Rule, 18 J. Land Use & Envtl. L. 209, 240, 242 (2003) ("following *Williamson County*, many federal courts have converted the state procedures rule into a permanent jurisdictional bar by applying state rules of claim and issue preclusion.").

The Ninth Circuit squarely acknowledged that its holding "expressly conflicts" with the Second Circuit's holding that state rules of issue preclusion cannot prevent the federal courts from reviewing the merits of federal Takings claims. *San Remo III*, App. B-15a, discussing *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 128 (2003), cert. pet.(on other issues) pending, No. 04-142. The other Circuits that have considered this issue are also split, with the Third and Tenth Circuits agreeing with the Ninth Circuit[2] and the Fourth, Fifth and Eleventh Circuits agreeing with the Second Circuit.[3]

This split in the Circuits reflects the lower courts' struggle to deal with the consequences of the *Williamson County* ripeness doctrine. The interplay of ripeness and issue preclusion creates an irreconcilable conflict between principles of finality, which militate in favor of issue preclusion, and principles of fairness, which require the

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[2] *Peduto v. City of North Wildwood*, 878 F.2d 725, 729 (3d Cir. 1989); *Wilkinson v. Pitkin County Bd. of County Commissioners*, 142 F.3d 1319, 1323-1325 (10th Cir. 1998).

[3] *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998); *Jennings v. Caddo Parish School Bd.*, 531 F.3d 1331 (5th Cir. 1976); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1305-1306 (11th Cir.1992).

federal courts to review the merits of federal takings claims even if the state courts deny compensation under state law. This split, and the underlying conflict between the principles of finality and fairness, can only be resolved by this Court.

The Second Circuit explained the reasons that the constitutional mandate should prevail over the Ninth Circuit's rule:

> It would be both ironic and unfair if the very procedure that the Supreme Court required [Takings plaintiffs] to follow before bringing a Fifth Amendment takings claim - a state court-inverse condemnation action - also precluded [them] from ever bringing a Fifth Amendment takings claim.

Santini, 342 F.3d at 130.

As the Second Circuit emphasized:

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims.

Santini, 342 F.3d at 128, quoting *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415 (1964).

The Second Circuit refused to follow the Ninth Circuit's rule because it creates a "Catch-22 for Takings plaintiffs": under *Williamson County*, they are required to seek compensation in state court to make the federal Takings claim

ripe, but once the federal Takings claim is ripe, it would be defeated by the preclusive effect of the state court judgment. *Santini*, 342 F.3d at 127.

If not reversed by this Court, the Ninth Circuit's rule will prevent federal Takings' plaintiffs from seeking review on the merits in this Court. In this case, for example, petitioners could not have filed a petition for certiorari to review the California Supreme Court decision because that court did not decide any federal question. *San Remo II*, App. E-107a, n. 1.[4] Indeed, the California courts could not have decided the federal Takings claims because those claims may not be brought in state court until the state compensation remedy has been denied. *Breneric Associates v. City of Del Mar*, 69 Cal.App.4th 166, 188-189, 81 Cal.Rptr.2d 324, 338-339 (1998) (*Williamson County* ripeness requirement applies in state courts); see also *Santini*, 342 F.3d at 126-127, discussing *Melillo v. City of New Haven*, 249 Conn. 138, 154, 732 A.2d 133, 143 n. 28 (1999) (Connecticut applies same rule as *Breneric*). Even this petition cannot raise the merits; instead, it can only raise the substantive federal Takings law

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[4] All seven justices of the California Supreme Court expressly stated that they expected that petitioners would obtain a ruling on the merits of their federal claims in this federal court action. The majority stated that petitioners "explicitly reserved their federal causes of action" and that because petitioners relied "solely on state law, no federal question has been presented or decided in this case." *San Remo II*, App. E-107a, n. 1. Both dissents made the same point. *San Remo II*, App. E-170a (Baxter and Chin, dissenting: "Plaintiffs have reserved their federal claims and, if rebuffed here, will resume their federal litigation"); App. E-194a (Brown, dissenting: "I dissent and hope the plaintiffs find a more receptive forum in the federal courts.").

issue because it was a necessary predicate of the Ninth Circuit's decision on the issue preclusion question.

The Ninth Circuit's barrier to federal court consideration of Fifth Amendment claims is indefensible. Under the Ninth Circuit's rule, the Fifth Amendment's protection of property rights is relegated to the "status of a poor relation" of the other rights secured by the Bill of Rights. *Cf., Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

In sum, the Ninth Circuit's rule effectively precludes consideration of the merits of federal Takings claims in both state and federal court and leaves plaintiffs with nothing but state compensation claims in the state courts – and no opportunity at all for this Court to review the merits. The Ninth Circuit's rule cannot be squared with this Court's rationales in *Williamson County* and *England*; therefore, this Court should grant the petition for certiorari and adopt the Second Circuit's holding in *Santini*.

II. THERE IS A NATIONWIDE SPLIT OF AUTHORITY ON WHETHER EXACTIONS IMPOSED BY LEGISLATION ARE SUBJECT TO HEIGHTENED SCRUTINY

Although the Ninth Circuit did not reach the merits, under the applicable state law rules of issue preclusion, it was required to determine whether the substantive federal law of Takings is the same as California state law governing compensation claims. App. B-16a-17a. The Ninth Circuit concluded that the federal Takings rule is the same as the state law rule announced by the California Supreme Court: there is no heightened scrutiny for exactions imposed by legislation. *San Remo III*, App. B-17a-21a. The Ninth Circuit concluded that "rational relationship" is the correct federal test for

legislative exactions (*id.*), despite this Court's rejection of that test for Takings claims challenging administrative exactions because it is too deferential. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

Justices Thomas and O'Connor recognized ten years ago that the distinction between legislative and administrative exactions raises an important question and that there already was "confusion in the lower courts". *Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995) (dissenting from denial of certiorari). Their dissent emphasized that:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Id., 515 U.S. at 1117-1118.

Now, there is even more confusion; in fact, there is a "nationwide split of authority" on the issue of whether heightened scrutiny applies to legislatively imposed exactions. E.g., Faus, Richard, *Exactions, Impact Fees, and Dedications – Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 Stetson L. Rev. 675, 704 (2000). State courts in New York, Texas, Ohio, Illinois, Washington and federal courts in the First and Fourth Circuits have applied heightened scrutiny to exactions imposed by legislation.[5] By

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[5] *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 107, 111, 542 N.E.2d 1059, 1065-1066, 1068 (1989); *Town of Flower*

contrast, state courts in Colorado, Oregon, Arizona, North Dakota, and Georgia and a federal court in the Tenth Circuit have applied a deferential level of scrutiny akin to the rational basis test.[6]

The level of scrutiny is critical, of course, because it determines the outcome in almost every case. As Gerald Gunther observed, the rational basis test is "minimal scrutiny in theory and virtually none in fact". Gunther, Gerald, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972). Thus, in this case, the application of deferential scrutiny resulted in a finding that the San Francisco Hotel Ordinance is

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Mound v. Stafford Estates Ltd., 47 Tex. Sup. Ct. J. 497, 135 S.W.3d 620, 640-642 (2004); *Home Builders Ass'n v. City of Beavercreek*, 89 Ohio St.3d 121, 128, 729 N.E.2d 349, 356 (2000); *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 165 Ill.2d 25, 31-33, 649 N.E.2d 384, 388-389 (1995); *Trimen Development Co. v. King County*, 124 Wash.2d 261, 273-274, 877 P.2d 187, 194 (1994); *National Ass'n of Home Builders v. Chesterfield County*, 907 F.Supp. 166, 168-169 (E.D. Va. 1995), aff'd 92 F.3d 1180 (4th Cir. 1996); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 14 (1st Cir. 1995).

[6] *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695-697 (Colo. 2001); *Rogers Machinery, Inc. v. Washington County*, 181 Or.App. 369, 397-398, 45 P.3d 966, 982 (2002); *Home Builders Ass'n v. City of Scottsdale*, 187 Ariz. 479, 486, 930 P.2d 993, 1000 (1997); *Southeast Cass Water Resource Dist. v. Burlington Northern Railroad Co.*, 527 N.W.2d 884, 896 (N.D. 1995); *Parking Ass'n of Georgia v. City of Atlanta*, 264 Ga. 764, 766, 450 S.E.2d 200, 203 n. 3 (1994); *Harris v. City of Wichita*, 862 F.Supp. 287, 294 (D. Kan. 1994), aff'd, 74 F.3d 1249 (10th Cir. 1996).

constitutional. Yet, when a virtually identical New York City ordinance was subjected to heightened scrutiny, it was found unconstitutional. *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059 (1989).[7]

This case presents a clear choice between the two conflicting views that animate the split in authority. The courts that apply heightened scrutiny believe that it is required to protect against the danger of government leveraging, i.e., by imposing a permit condition that requires the payment of an exaction that is unrelated or disproportionate to the development allowed by the permit. On the other hand, the courts that apply deferential scrutiny believe that the democratic political process will protect even small groups of property owners from the danger of leveraging.

The former view was adopted by the New York Court of Appeals, which explained that heightened scrutiny is necessary to distinguish regulations involving "the adjustment of rights for the public good" from regulations forcing "'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'". *Seawall*, 74 N.Y.2d at 107, 111, 542 N.E.2d at 1065-1066, 1068, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Thus, the critical feature of the New York City ordinance that led to its invalidation was its imposition of an exaction:

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[7] This Court denied certiorari in *Seawall*, 493 U.S. 976, and a prior case involving the constitutionality of San Francisco's Hotel Ordinance. *Lambert v. City and County of San Francisco*, 529 U.S. 1045, 120 S.Ct. 1549 (2000) (Justices Scalia, Kennedy, and Thomas dissenting). This is a better case than *Lambert* to resolve the issue of heightened scrutiny because the City denied the Lamberts' permit instead of granting it with an exaction condition. *Lambert*, 120 S.Ct. at 1550.

> [B]y equating the "cure" with dollars -- i.e., permitting "buy-out" payments of $45,000 per [hotel] unit . . . -- the terms of [the ordinance] itself demonstrate that the obligations placed on a few property owners are just the kind which could, and should, be borne by the taxpayers as a whole.

Seawall, 74 N.Y.2d at 112, 542 N.E.2d at 1069.[8]

By contrast, the four-justice majority of the California Supreme Court decided to apply a very deferential level of scrutiny under the state constitution because the City used generally applicable legislation to impose the exaction. *San Remo II*, App. E-140a-142a. Their primary rationale was that while the political process is not sufficient to protect the rights of a single property owner when an administrative agency imposes an exaction, it is sufficient to protect the rights of even very small groups of property owners when a legislative body imposes an exaction. *San Remo II*, App. E-141a.

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[8] The California Supreme Court majority asserted that *Seawall* was "impliedly overruled" by *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). *San Remo II*, App. E-145a, n. 15, citing *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 94 N.Y.2d 96, 107, 721 N.E.2d 971, 975 (1999). That assertion is wrong. *Del Monte Dunes* holds that the rough proportionality test of *Dolan* does not apply when a permit is *denied*. *Del Monte Dunes*, 526 U.S. at 703. Similarly, *Bonnie* does not address the *Seawall* holding that heightened scrutiny applies to an exaction imposed by legislation; instead, it was only concerned with the appropriate level of scrutiny for a permit *denial*. *Bonnie*, 94 N.Y.2d at 108, 721 N.E.2d at 976. Neither *Del Monte Dunes* nor *Bonnie* affects the analysis of *Seawall* or this case because the City did not deny petitioners' permit, the City granted the permit -- with a $567,000 exaction.

The three dissenting justices disagreed, as Justice Janice Rogers Brown explained:

> [P]rivate property, already an endangered species in California, is now entirely extinct in San Francisco. The City and County of San Francisco has implemented a neo-feudal regime where the nominal owner of property must use that property according to the preferences of the majorities that prevail in the political process - or, worse, the political powerbrokers who often control the government independently of majoritarian preferences.

San Remo II, App. E-175a-176a.

The Texas Supreme Court recently reached a similar conclusion:

> [W]e think it entirely possible that the government could "gang up" on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others.

Town of Flower Mound v. Stafford Estates Ltd. Partnership, 47 Tex. Sup. Ct. J. 497, 135 S.W.3d 620, 641 (Tex. 2004).

Nevertheless, the Ninth Circuit concluded that the California Supreme Court's state law ruling is consistent with federal Takings law. In short, the Ninth Circuit concluded that, under the federal Takings Clause, only a deferential level of scrutiny is applied to legislative exactions. *San Remo III*, App. B-17a-21a. The Ninth Circuit's conclusion defies this Court's repeated statements that the Takings test requires a higher level of scrutiny than the rational basis test under the

Due Process Clause. *Nollan*, 483 U.S. at 834 n. 3 ("our verbal formulations in the takings field have generally been quite different" from due process and equal protection); *Dolan*, 512 U.S. at 391 (Takings claims are subject to judicial review that is higher than the "minimal level of scrutiny" mandated by due process and equal protection).

As this Court recognized in *Nollan* and *Dolan*, limiting judicial review to a deferential level of scrutiny provides no protection against the dangers of governmental leveraging. Indeed, a deferential level of scrutiny enables local governments to put zoning up for sale; thus, rewarding local governments that enact severe use restrictions, but allow property owners to buy their way out of the restrictions. Indeed, under the Ninth Circuit's deferential scrutiny, cities could prohibit all development except for one-story, single-family homes, but offer a second story permit for $20,000, an apartment building permit for $10,000 per unit, a commercial building permit for $50,000 per floor, and so forth. That very result was both predicted and condemned by this Court:

> One would expect that a [permit] regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes.
>
> . . . . .
>
> [T]he situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety . . ., adding the unrelated condition alters the purpose to one which, while it may be

> legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster.

Nollan v. California Coastal Commission, 483 U.S. 825, 837 and n. 5 (1987).

This case presents an egregious illustration of the leveraging allowed by deferential scrutiny. The City based the $567,000 exaction on the mistaken report that all of the San Remo Hotel's rooms were occupied by residential tenants during the specified 32 days in 1979. But, even if the San Remo Hotel had always been occupied by residential tenants, the City may not impose conditions based on the City's "loss" of the owner's prior use of the property:

> The city may not constitutionally measure the magnitude of its loss, or of the . . . exaction, by the value of facilities it had no right to appropriate without payment.

Ehrlich v. City of Culver City, 12 Cal.4th 854, 883, 50 Cal.Rptr.2d 202, 262 (1996).

In this case, the state court distinguished *Ehrlich* because the exaction in that case was imposed by an administrative adjudication. *San Remo II*, App. E-139a-140a. But, that distinction demonstrates that applying different levels of scrutiny to administrative and legislative exactions encourages local governments to simply change the techniques and labels used to impose exactions. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n. 12 (1992) (deferential scrutiny "amounts to a test of whether the

legislature has a stupid staff"); *Nollan*, 483 U.S. at 841 (compliance with the Fifth Amendment is "more than an exercise in cleverness and imagination").

In sum, this case presents a perfect opportunity to resolve the nationwide split of authority. The stark conflict in the outcomes of this case and *Seawall* highlights the rationales of the two possible tests as well as the outcome-determinativeness of the choice between the tests. This issue has percolated long enough in the lower courts. No further light will be shed on this issue by allowing the lower courts to continue grappling with the issue. This Court should grant the petition and resolve the nationwide split of authority.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Dated: September 7, 2004.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-15853

[Filed June 9, 2004]

THE SAN REMO HOTEL L.P.; et al.,
Plaintiffs-Appellants,

v.

SAN FRANCISCO CITY AND COUNTY,
a Municipal Corporation; et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
D.C. No. CV-93-01644-DLJ
D. Lowell Jensen, District Judge, Presiding

Before: Fernandez, Hawkins, and Thomas, Circuit Judges

ORDER

The Application of Pacific Legal Foundation for Leave to File Brief Amicus Curiae in Support of Rehearing En Banc is GRANTED. The Brief is ordered filed.

Judge Fernandez recommended denying the Petition for Rehearing En Banc. Judges Hawkins and Thomas voted to deny the Petition.

The full court was advised of the Petition for Rehearing En Banc and no Judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Rehearing En Banc is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-15853

[Filed April 14, 2004]

THE SAN REMO HOTEL L.P.; THOMAS FIELD; ROBERT FIELD; T&R INVESTMENT CORP., Plaintiffs-Appellants,	)
v.	)
SAN FRANCISCO CITY AND COUNTY, a Municipal Corporation; DEPARTMENT OF CITY PLANNING; CITY PLANNING COMMISSION; BOARD OF PERMIT APPEALS; BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, Defendants-Appellees.	)

Appeal from the United States District Court
for the Northern District of California
D.C. No. CV-93-01644-DLJ
D. Lowell Jensen, District Judge, Presiding

Before: Ferdinand F. Fernandez, Michael Daly Hawkins, and Sidney R. Thomas, Circuit Judges

OPINION

HAWKINS, Circuit Judge:

In the second appeal before this court, the owners of the San Remo Hotel challenge the constitutionality of a San Francisco ordinance which restricts an owner's ability to convert "residential" hotel rooms to tourist use. A prior panel ordered *Pullman* abstention at plaintiffs' request, and also declared some claims unripe, deferring a decision until after the claim had been litigated in the California courts. *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998) ("*San Remo I*").

After losing their state takings claims in the California courts, *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643, 117 Cal. Rptr. 2d 269, 41 P.3d 87 (2002) ("*San Remo II*"), the plaintiffs now seek to assert their federal takings claims in federal court. However, we agree with the district court that the California Supreme Court's adjudication of the state takings claims was an "equivalent determination" of the federal takings claims, and that plaintiffs are therefore barred from relitigating the takings issues by the doctrine of issue preclusion, pursuant to this circuit's precedent in *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) ("*Dodd I*"), and *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) ("*Dodd II*").

FACTS AND PROCEDURAL HISTORY

Most of the relevant factual background was recounted in our prior published decision; we repeat it here as necessary to

set the stage for this appeal:

I. The Statutory Framework

San Francisco has enacted several hotel conversion ordinances in order to stop the depletion of housing for the poor, elderly and disabled. The City conducted a study that revealed that between 1975 and 1979, almost 20 percent of the residential hotel units in the City were lost due to demolition and conversion, and that most of the conversion was from residential to tourist use. [Hotel Conversion Ordinance (HCO)] § 41.3(d). In 1979, the City enacted its first HCO as a temporary measure, which it later codified as a permanent ordinance in 1981.

Under the 1981 HCO, hotel units could be converted to non-residential use only if the owner obtained a permit to convert. The City granted a permit only if the property owner provided relocation assistance to hotel residents and replaced the residential hotel units being converted through one of the following methods: (1) construction of an equal number of replacement units; (2) rehabilitation of an equal number of residential hotel units; or (3) contribution of a fee to the City's Residential Hotel Preservation Fund Account in the amount of 40 percent of the construction costs of the number of units converted (the "in lieu payment"). HCO §§ 41.12 & 41.13.

The 1981 HCO defined a "residential unit" as a hotel room occupied by a permanent resident as of September 23, 1979, *i.e.*, the 1981 HCO was an extension of the 1979 moratorium. To determine

whether a unit was residential as of September 23, 1979, the City sent surveys to the operators of hotels.

In May 1990, the City repealed the 1981 HCO and enacted the 1990 HCO. This new ordinance made four changes from the old law: (1) it prohibited the summer tourist use of residential rooms; (2) it increased the in lieu payment from 40 percent to 80 percent; (3) it added the requirement that any hotel that rents rooms to tourists during the summer must rent the rooms at least 50 percent of the time to permanent residents during the winter; and (4) the new law did not provide for relief on the ground of economic hardship. To ease the effect of the new ordinance, the 1990 HCO allowed hotel owners who applied before May 12, 1990, to pay a 40 percent in lieu fee, instead of the otherwise-required 80 percent fee.

Entirely distinct from the HCOs are the City's zoning ordinances. In 1987, the City enacted the North Beach Neighborhood Commercial District zoning ordinance ("zoning law"), which requires conditional use authorization to establish a tourist hotel. Owners who establish a prior non-conforming commercial use are exempt from this requirement of obtaining a conditional use permit. The zoning law borrows the September 23, 1979, classification from the HCO in order to determine what is a residential unit. In other words, a hotel unit that had been mistakenly characterized as residential under the HCO but that in fact was operating commercially as a tourist unit in 1987 would *not* be said to have a prior non-conforming use under the zoning law, despite the actual use of the unit.

II. The Facts

The plaintiffs are the owners of the San Remo Hotel, as well as the hotel itself. . . . [Plaintiffs] bought the San Remo Hotel in 1971, when it was zoned for commercial use and was subject to no restrictions on tourist use. [They] leased the hotel to Jean Irribarren (not a party) from 1977 to 1983. Irribarren spoke English badly, and when the 1979 survey arrived and asked him to indicate the nature of the hotel units for the new HCO, Irribarren mistakenly indicated that every single one of the hotel's 62 units was residential. [Plaintiffs] had no notice or knowledge of this survey, or of Irribarren's responses.

In 1984, after the lease to Irribarren expired, [plaintiffs] again began operating the hotel. In [their] 1984 Annual Unit Usage Report, [plaintiffs] stated that the actual use of the hotel on September 30, 1984, was still as 62 residential units and zero tourist units. [They] explain this usage report by arguing that the 1981 HCO was not burdensome to comply with, even with the residential designation. In particular, the 1981 HCO allowed for unlimited tourist use of residential rooms from May to October, which are the most profitable months for a tourist hotel.

On May 11, 1990, [plaintiffs] applied under the 1990 HCO to convert the 62 residential rooms to tourist use. The City Zoning Administrator objected on the ground that if such a conversion were granted, the hotel would then be operating in violation of the zoning laws. After all, the 1987 zoning law looked back to the September 23, 1979, survey and characterized the hotel as entirely residential.

Therefore, even though the hotel had arguably been operating as a tourist hotel when the zoning law was enacted in 1987, it was not considered a prior non-conforming use. In order to satisfy the zoning law, [plaintiffs] had to obtain a conditional use permit, which [they have] never gotten.

[Plaintiffs] then filed an application for a conditional use permit, so the hotel would no longer be operating in violation of the zoning law. The Planning Department scheduled a hearing for August 20, 1992, before the City Planning Commission to decide the merits of this application. On August 19, 1992, the Planning Department concluded that the Commission lacked jurisdiction to decide what the hotel's prior zoning status had been, and the parties agreed to continue the hearing until the Zoning Administrator could make such a determination. On September 9, 1992, the Zoning Administrator formally declared that the hotel had not been zoned for commercial use. Therefore, a conditional use permit would be required.

[Plaintiffs] appealed to the Board of Permit Appeals ("BPA"), arguing that the hotel was already a permitted conditional use or a prior non-conforming use. [Plaintiffs] also argued that using the HCO to convert the hotel into a truly residential hotel would be an unconstitutional taking and a denial of equal protection. The BPA rejected this argument and held the hotel bound by the 1979 classification. It concluded that the prior disobedience to the 1987 zoning law was not a prior non-conforming use but a special exception allowed (but no longer) by the Zoning Administrator. Thus, the BPA held that

[plaintiffs were] required to get a conditional use permit.

The case then went back to the Planning Commission, which on January 21, 1993, approved [plaintiffs'] application for a conditional use permit, provided: (1) [plaintiffs] paid 40 percent of the cost of replacement housing to make up for the loss of the 62 residential units; (2) [plaintiffs] offered lifetime leases to existing long-term tenants; and (3) [plaintiffs] fulfilled other minor conditions. The BPA affirmed.

On March 12, 1993, [plaintiffs] filed a petition for administrative mandamus in state court, challenging the BPA's decision that classified the hotel as residential. This mandamus action has been stayed by stipulation of the parties.

On April 19, 1993, the City's Board of Supervisors rejected [plaintiffs'] appeal of the Planning Commission's decision and upheld the conditions for the conditional use permit.

On May 4, 1993, [plaintiffs] filed this action against the City under 42 U.S.C. § 1983.

San Remo I, 145 F.3d at 1098-1100 (internal footnotes omitted).

The complaint alleged, among other things, that the 1990 HCO was a facial and as-applied taking under the Fifth Amendment. In the prior appeal, plaintiffs sought and were granted *Pullman* abstention on their facial takings claim. *Id.* at 1104-05. The panel also held that plaintiffs' as-applied challenge was not ripe, and required plaintiffs to seek

compensation in state court pursuant to *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). *San Remo I*, 145 F.3d at 1102.

The plaintiffs then proceeded to state court, seeking (1) a petition for a writ of administrative mandate to overturn the City's administrative determination that they were required to obtain a conditional use permit in order to use all the hotel rooms for tourist rental, and (2) compensation for the taking of private property without just compensation in violation of the California constitution. *San Remo II*, 27 Cal.4th at 649. Although they could have also asserted their federal takings claims in California court, plaintiffs specifically reserved their federal claims for adjudication in federal court, pursuant to *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 420-21, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964).

The state trial court denied the writ petition and sustained a demurrer to the takings claims. The California Court of Appeal reversed, concluding that the plaintiffs had pled facts sufficient to effect a taking under the California constitution when applying the *Nollan/Dolan*[1] standard of scrutiny to the monetary fee. 27 Cal.4th at 657. The California Supreme Court reversed, affirming the conclusion of the trial court. *Id.* at 679.

In analyzing the state takings claim, the California Supreme Court noted that the California constitution protects a "somewhat broader range of property values" than the

[1] *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

corresponding federal provision, but that it otherwise generally construes the clauses congruently. *Id.* at 664. Accordingly, it relied on both state and federal takings cases to reach its decision, concluding that the heightened scrutiny applied by the United States Supreme Court in *Nollan* and *Dolan* did not apply to an ordinance of general applicability such as the one at issue, *id.* at 664-72, and that the fee imposed by the statute bore a reasonable relationship in both intended use and amount to the perceived problems stemming from a change in the hotel's use. *Id.* at 672-77. The California Supreme Court also rejected plaintiffs' as-applied challenge, concluding that the mitigation fee was reasonably based on the number of units that were self-reported as residential in 1979, and pointing out that the complaint contained no specific allegations regarding the hotel's use on that initial status date, only that it was used by "transient and tourist" guests since 1916. *Id.* at 677-79.

Plaintiffs then returned to federal court, seeking to adjudicate their federal takings claims. The district court, however, reinstated its earlier ruling that the facial challenge to the HCO was barred by the statute of limitations. It also determined that the plaintiffs did not actually state a separate "as-applied" challenge to the HCO, as the alleged harm arose not from a particular application of the HCO, but from its passage. Alternatively, the district court also found that the takings claims were barred by the doctrine of issue preclusion, because the substantive California takings law was coextensive with federal takings law. Because we agree with the district court's reasoning with respect to the issue preclusion doctrine, we express no opinion on its alternate holding regarding the statute of limitations.

STANDARD OF REVIEW

Decisions regarding issue preclusion are reviewed de novo, *see Littlejohn v. United States*, 321 F.3d 915, 919 (9th Cir. 2003), as are questions of constitutional law. *See Krug v. Lutz*, 329 F.3d 692, 695 (9th Cir. 2003).

DISCUSSION

I. *Applicability of Issue Preclusion where* Pullman *or* Williamson County *requires adjudication in state court*

The district court concluded that plaintiffs' takings claims should be dismissed under the doctrine of issue preclusion because the takings issues were fully litigated in state court. Plaintiffs assert that there should be no issue preclusion where a plaintiff is required to litigate in state court pursuant to *Pullman* abstention and his federal claims have been specifically reserved under *England*, or where a plaintiff cannot assert a ripe takings claim in federal court until he has sought compensation in state court under *Williamson County*. Plaintiffs argue that "involuntary" trips to state court in these circumstances should not preclude federal adjudication of federal claims, regardless of what issues were actually litigated and decided in state court.

To begin with, we must carefully draw a distinction between claim preclusion and issue preclusion. Claim preclusion precludes relitigation of claims that were raised or should have been raised in earlier litigation. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984). Issue preclusion, on the other hand, forecloses relitigation of factual or legal issues that have been actually and necessarily decided in earlier litigation. *Id.* The City does not dispute that the plaintiffs' *England*

reservation was sufficient to avoid the doctrine of *claim* preclusion; rather, it argues that this circuit's decisions in *Dodd I* and *Dodd II* illustrate that issue preclusion may still apply even when a plaintiff has reserved federal claims pursuant to *England*.

The Dodds had purchased property in a Forest Use Zone in Hood River County, Oregon, intending to build a retirement home. *Dodd I*, 59 F.3d at 855. After their purchase, the County approved an ordinance requiring that forest dwellings be allowed in forest use zones only where "necessary and accessory" to forest use. *Id.* at 856. A few years later, they applied for and were denied applications for building permits, variances, zoning changes, etc. *Id.* They pursued various state remedies, including a state action asserting a claim under the Oregon takings clause. *Id.* at 857. Although not in state court involuntarily as a result of *Pullman* abstention, they specifically reserved their right to have any federal takings claim adjudicated in federal court. *Id.*

The Dodds filed a federal action as well, asserting violation of the federal takings clause; the action was stayed pending resolution of the Oregon case, which was ultimately decided adversely to the Dodds. *Id.* In *Dodd I*, we refused to apply *claim* preclusion to dismiss the Dodds' federal takings claim. *Id.* at 861-63. However, we went on to note that "the question of *issue* preclusion is still very much in this case." *Id.* at 863 (emphasis added). We explained that the lower court had not decided whether the Oregon Supreme Court's decision on the state takings claim was "an equivalent determination under the federal takings clause so as to invoke the doctrine of issue preclusion." *Id.* The case was remanded for further proceedings.

In the second appeal, we compared the Dodds' state law claim that they were denied a substantial beneficial use of their property with the federal takings analysis of whether an "economically viable use" of their property remained, and concluded that the issue in the two proceedings was identical, and that the other requirements for issue preclusion under Oregon law were satisfied. *Dodd II*, 136 F.3d at 1225-27. More importantly for purposes of this case, we specifically rejected the Dodds' argument that their reservation of federal takings claims under *England* prevented operation of the issue preclusion doctrine. 136 F.3d at 1227 ("the reservation doctrine does not enable them to avoid preclusion of issues actually litigated in the state forum"). As we noted:

> To the extent that they fully litigated a necessary issue in the course of the state proceedings that is identical to an issue before the federal court, the Dodds are precluded from taking a second bite of the apple. The teachings of the Supreme Court are instructive in this regard:
>
> > There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

Id. at 1227-28 (quoting *Allen v. McCurry*, 449 U.S. 90, 104, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980)).

Plaintiffs also urge us to follow the reasoning of the Second Circuit in its recent decision, *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003),

which held that a plaintiff who must proceed in state court to ripen his takings claim under *Williamson County* should not then be precluded from raising an identical claim in federal court, so long as the plaintiff reserved his federal claim under *England*. 342 F.3d at 128. *Santini*, however, expressly conflicts with another Ninth Circuit precedent, *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 365 (9th Cir. 1993), which held that claim preclusion *can* bar adjudication in federal court even where *Williamson County* requires a plaintiff to first seek compensation in state court. *See Santini*, 342 F.3d at 128 (expressing disapproval of *Palomar* and other cases, and deciding to "part ways with most of our sister circuits"). Of course, we are not free to simply disregard *Palomar* and *Dodd II* in favor of out-of-circuit precedent.[2]

Accordingly, we are compelled to follow *Dodd I*/*Dodd II*/*Palomar* and hold that the doctrine of issue preclusion can

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[2] Recognizing this, plaintiffs argue that *Palomar*/*Williamson County* should not be followed because of the Supreme Court's intervening decision in *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997), in which the Court held that defendants can remove takings cases to federal court even though the removal statute only allows removal of cases that could have been brought originally in federal court. *Id.* at 163-65. *College of Surgeons*, however, does not even cite *Williamson County*, much less overrule it. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18, 120 S. Ct. 1084, 146 L. Ed. 2d 1 (2000) ("This Court does not normally overturn, or so dramatically limit earlier authority *sub silentio*."). Other circuits have also rejected the argument that *College of Surgeons* modified the ripeness requirements of *Williamson County*. *Kottschade v. City of Rochester*, 319 F.3d 1038, 1040-41 (8th Cir.), *cert. denied*, 124 S. Ct. 178, 157 L. Ed. 2d 46 (2003); *Santini*, 342 F.3d at 129 n.6.

apply to bar relitigation in federal court of issues necessarily decided in state court, notwithstanding that plaintiffs must litigate in state court pursuant to *Pullman* and/or *Williamson County*. We must therefore determine whether the district court properly applied issue preclusion on the facts of this case. *See Dodd I*, 59 F.3d at 863.

II. *Issue Preclusion under California Law*

Issue preclusion applies if the state courts would give preclusive effect to the judgment of the state court and the state and federal substantive law of takings are equivalent. *Dodd I*, 59 F.3d at 863; *Dodd II*, 136 F.3d at 1225. California courts apply the doctrine of issue preclusion (also referred to as collateral estoppel in state courts) if: (1) the issue decided in the prior case is identical with the one now presented; (2) there was a final judgment on the merits in the prior case, and (3) the party to be estopped was a party to the prior adjudication. *Stolz v. Bank of America*, 15 Cal.App.4th 217, 222, 19 Cal. Rptr. 2d 19 (1993).[3] As the district court

[3] Plaintiffs argue that issue preclusion in California applies only to questions of fact that were decided in the earlier proceeding, and not to issues of law, citing *Albertson v. Raboff*, 46 Cal.2d 375, 384-85, 295 P.2d 405 (1956). Because the California Supreme Court merely sustained the demurrer, and did not include any factual determination, plaintiffs argue that it should not be given any preclusive effect. *Albertson*, however, merely held that only those facts necessary to the prior judgment are considered res judicata in a second action. California courts recognize that issue preclusion can apply to questions of law, so long as the application of the doctrine would not work injustice. *See, e.g., Rutherford v. State*, 188 Cal. App. 3d 1267, 1283, 233 Cal. Rptr. 781 (1987); *United States Fire Ins. Co. v. Johansen*, 270 Cal. App. 2d 824, 834-35, 76 Cal. Rptr. 174 (1969); *Pacific Maritime Assn. v. California Unemp. Ins. Appeal Bd.*, 236 Cal. App. 2d 325, 333, 45 Cal. Rptr. 892 (1965).

concluded, the California Supreme Court's decision in *San Remo II* satisfies this test. The facial and as-applied takings challenges raised in state court are identical to the federal claims asserted by the plaintiffs, and are based on the same factual allegations. The California Supreme Court decision was a final judgment on the merits, and the plaintiffs were a party to the state court adjudication.

Moreover, as required by *Dodd I*, the determination of the state takings claims was "an equivalent determination" of the federal takings claims. 59 F.3d at 863. In *San Remo II*, the California Supreme Court noted that the California takings clause actually protects a broader range of property values than the federal takings clause, because the California provision includes the concept of "damage" to the property as well as "taking." 27 Cal. 4th at 663-64. Aside from that difference, the California high court noted that it had construed the clauses congruently. *Id.* at 664. Thus, in reaching its decision on the merits of the plaintiffs' state takings claims, it applied "the relevant decisions of both this court and the United States Supreme Court." *Id.*

Plaintiffs contend, however, that California takings law is not coextensive with federal takings law, in part because the California Supreme Court failed to apply the "heightened scrutiny" of *Nollan* and *Dolan* to the monetary exactions in this case. In *Nollan*, landowners challenged the California Coastal Commission's decision to condition the Nollans' building permit on the grant of an easement across their beachfront. 483 U.S. at 828. The Court noted that it had long recognized that land-use regulation does not effect a taking if it "'substantially advance[s] legitimate state interests' and

does not 'den[y] an owner economically viable use of his land.'" *Id.* at 834 (*quoting Agins v. Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)). It pointed out that prior cases had not elaborated on the standards for determining what type of connection was required between the regulation and the state interest. *Id.* The Court went on to require an "essential nexus" between the condition and the state's purpose, and found that such a nexus was lacking in that case. *Id.* at 837.

A few years later, the Court revisited the exactions issue in *Dolan*, a case in which the city conditioned approval of a building expansion on the dedication of land for a public greenway and pedestrian/bicycle pathway. 512 U.S. at 379-80. The Court found that, unlike in *Nollan*, there was some connection between the conditions and the proposed expanded development. *Id.* at 387-88. It then went on to consider the degree of connection required, and ultimately settled on an "intermediate position" similar to that employed by numerous state courts, i.e., that the municipality must show some form of "reasonable relationship" between the required dedication and the impact of the proposed development. *Id.* at 389-91. The Court, however, thought the term "reasonable relationship" might be confusingly similar to the term "rational basis," and thus created a new term: "rough proportionality." *Id.* at 391; *see also id.* ("No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

Plaintiffs argue the heightened "rough proportionality" review of *Dolan* should be applied to both their facial and as-applied takings claims. The California Supreme Court carefully examined this contention and concluded that *Nollan/*

Dolan does not apply to generally applicable legislation such as the ordinance in this case, but only where the government exercises discretionary powers, and acts more adjudicatively than legislatively. 27 Cal.4th at 664-72. The Court reasoned that heightened scrutiny is necessary when the city's action is isolated and discretionary, because there is more danger that the city will improperly leverage its power against a single landowner. *Id.* at 666-67. When the city acts legislatively, however, and enacts an ordinance that applies a fee across the board according to a set formula, the danger is diminished, because there is no discretionary application and because the group affected can use the elective processes to petition for change in the law. *Id.* at 668-72. The California Supreme Court thus instead analyzed whether the HCO bore a reasonable relationship to the loss of housing, which it considered a legitimate goal for the common good, and concluded that there was such a relationship. *See id.* at 673-678.

The California Supreme Court's analysis was thus equivalent to the approach taken in this circuit, which has also rejected the applicability of *Nollan/Dolan* to monetary exactions such as the ones at issue here. For example, in *Commercial Builders of N. Cal. v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931, 118 L. Ed. 2d 593 (1992), the City of Sacramento found that nonresidential development created a need for low income housing in the city, and enacted an ordinance which conditioned the issuance of nonresidential building permits on the payment of a fee, calculated according to a formula, into a fund designed to assist in financing low-income housing. *Id.* at 873. We affirmed, finding the ordinance was reasonably related to legitimate public purposes. *Id.* We also specifically rejected

the contention that *Nollan* materially changed the level of scrutiny to be applied to the ordinance. *Id.* at 874.[4]

Plaintiffs argue *Commercial Builders* should be disregarded because it was a pre-*Dolan* decision. However, *Dolan* simply refined the test articulated in *Nollan*, and, in any event, post-*Dolan*, this court again rejected the application of the "rough proportionality" requirement to a monetary exaction. In *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998), a divided panel upheld a city ordinance that required landlords to pay a $1,000 per tenant relocation assistance fee to low income tenants displaced by the change of use or substantial rehabilitation of a property. Judge Brunetti concluded that *Dolan* and *Nollan* provided "no support" for the plaintiffs' claims and specifically noted that *Dolan*'s "rough proportionality" test was necessarily inapplicable to facial takings challenges. *Id.* at 808, 811.[5]

Furthermore, the Supreme Court itself has limited the reach of *Nollan/Dolan*, explaining that "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions — land-use decisions conditioning approval of development on *the dedication of property to public use.*" *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702, 119 S. Ct. 1624, 143 L.

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[4] The court went on to say that in any event, there was a sufficient "nexus" between the fee provision at issue and the burdens caused by commercial development to pass constitutional muster. *Id.* at 875.

[5] District Judge Williams concurred in the result, but would have held that the takings clause did not apply to monetary fees, and that the claim should more appropriately be characterized as a due process violation. *Id.* at 817-21.

Ed. 2d 882 (1999) (emphasis added). In *Del Monte Dunes*, the Court approved of jury instructions based on the more classic "substantially advances" takings formulation, which asked the jury to evaluate whether or not a city's actions in denying a building permit on a specific piece of property were "reasonably related to legitimate public interests." *Id.* at 704; *see also Hotel & Motel Ass'n. v. City of Oakland*, 344 F.3d 959, 968 (9th Cir. 2003) (holding ordinance substantially advanced a legitimate state interest because a reasonable relationship existed between the regulation and the public purpose it was meant to serve); *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1041 (9th Cir. 2000) (noting in rent control takings case that a "challenged regulatory action 'substantially advances' its interest if it bears a reasonable relationship to that interest" and that *Del Monte Dunes* "teaches that a reasonable relationship does not depend on the State's action being roughly proportional to its asserted interests").

The California Supreme Court applied the "reasonable relationship" test to the plaintiffs' facial and as-applied takings claims. *San Remo II*, 27 Cal.4th at 672-79. In light of *Del Monte Dunes* and this circuit's precedent, this was an "equivalent determination" of such claims under the federal takings clause. *See Dodd I*, 59 F.3d at 863. Accordingly, the district court correctly concluded that federal takings claims are barred from litigation under the doctrine of issue preclusion.

AFFIRMED.

APPENDIX C

U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

No. C- 93-1644-DLJ

[Filed April 16, 2003]

SAN REMO HOTEL L.P,
THOMAS FIELD, ROBERT FIELD, AND
T&R INVESTMENT CORP.,
Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation, on behalf of the
DEPARTMENT OF CITY PLANNING,
CITY PLANNING COMMISSION,
AND BOARD OF SUPERVISORS,
Defendants.

ORDER

On March 21, 2003, the Court heard argument on defendants' motion to dismiss plaintiffs' Third Amended Complaint. Andrew W. Schwartz appeared on behalf of defendants; Paul F. Utrecht appeared on behalf of plaintiffs

("San Remo"). Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the court hereby GRANTS defendants' motion.

I. BACKGROUND

A. Factual Background and Procedural History

The Plaintiffs, Thomas and Robert Field (the "Fields"), own and operate the San Remo Hotel, a 62-unit property in San Francisco.

In 1981, the City of San Francisco enacted the Residential Hotel Unit Conversion and Demolition Ordinance ("HCO"), which limited the conversion of residential hotel units to nonresidential tourist use. *San Francisco Admin. Code*, Chapter 41. In May 1990, the City repealed the 1981 version of the HCO and enacted a new version.

The HCO is wholly separate from the City's zoning laws, which independently restrict conversion of residential property in some zoning districts. HCO § 41.13. In 1987, the Planning Commission and Zoning Administrator of the City of San Francisco adopted the North Beach Neighborhood Commercial District Zoning Ordinance ("NBNCD"), which changed the Planning Code applicable to tourist hotels in the zoning district in which the San Remo is located. *Planning Code §§ 722.1 et seq.* An owner seeking to convert a residential use to a tourist hotel is required to secure a conditional use permit from the City Planning Commission. *Id.* at § 722.55.

On January 21, 1993, after a public hearing, the Planning Commission approved plaintiffs' application for a conditional use permit upon satisfaction of the following conditions:

(1) Plaintiffs must mitigate the loss of the 62 residential hotel units by paying 40% of the cost of replacement housing, which equals $567,000;

(2) Plaintiffs must offer "lifetime leases" to existing long-term tenants; and

(3) Plaintiffs must seek and justify variances from the parking and floor area ratio limitations of the NBNCD Complaint ¶ 44.

Plaintiffs allege that they are informed and believe that the City has never imposed both a conditional payment of a replacement housing fee and the requirement of lifetime leases for existing tenants on a conditional use permit. Complaint ¶ 45.

On May 4, 1993, plaintiffs filed the instant action in U.S. District Court. At the same time, plaintiffs filed a petition for a writ of administrative mandate in state court challenging the decision of the City's Board of Permit Appeals requiring the San Remo to obtain a conditional use permit to convert to a permanent tourist hotel.[1]

In July 1993, plaintiffs moved for a preliminary injunction prohibiting the City from enforcing the HCO against San Remo. While this matter was pending, on September 9, 1993, Judge Vukasin declared the HCO unconstitutional on its face in *Golden Gate*. On September 16, 1993, based on the ruling

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[1] Following the Ninth Circuits decision in *San Remo v. City and County of San Francisco*, 145 F.3d 1095, as discussed below, San Remo amended its state court action to assert facial and as-applied takings claims.

in *Golden Gate*, Judge Vukasin granted plaintiffs' preliminary injunction in the instant case. The Order enjoined the City from requiring compliance with any condition of approval or taking any steps to prohibit plaintiffs from using the San Remo as a commercial tourist hotel. The City filed a notice of appeal and an emergency motion for a stay of the preliminary injunction. The Ninth Circuit denied the motion for stay and the City thereafter abandoned its appeal.

On September 28, 1993, San Remo's case was assigned to this Court.

On January 24, 1994, San Remo filed a first amended complaint. Plaintiffs' amended complaint challenged the constitutionality of the HCO and the validity of the replacement housing condition in the conditional use permit.

Beginning in March 1994, subsequent developments in the courts eroded the basis for the preliminary injunction granted to San Remo. On March 18, 1994, the Ninth Circuit vacated, reversed, and remanded the decision in *Golden Gate* for a determination as to whether appellants' complaint was time-barred under the applicable statute of limitations. *See Golden Gate Hotel Ass'n. v. City and County of San Francisco*, 18 F.3d 1482 (9th Cir. 1994). On remand, *Golden Gate* was assigned to this court.

On remand, in *Golden Gate*, this Court entered judgment for the City, finding the action time-barred by the applicable statute of limitations and thus dismissing the case. *See Golden Gate Hotel Ass'n. v. City & County of San Francisco*, 1994 U.S. Dist LEXIS 11313 (N.D. Cal. Aug. 2, 1994). On appeal, the Ninth Circuit affirmed this district court's order. *See Golden Gate Hotel Ass'n, v. City and County of San*

Francisco, 76 F. 3d 386 (Table) (9th Cir. 1996), *cert denied*, 519 U.S. 808 (1996).

At the same time as *Golden Gate*, other cases challenging the HCO and related to *Golden Gate* were also assigned to this Court. In addition to the related case of *San Remo*, this Court was assigned *Harsch Investment Co v. City & County of San Francisco*, *Djavahari v. City & County of San Francisco*, *Tsang v. Superior Court of San Francisco*, and *Sparks v. City and County of San Francisco.*[2]

In *Harsch Investment Corp. v. City and County of San Francisco*, plaintiff alleged virtually the same claims as San Remo, and was represented by the same counsel. On June 21, 1994, this Court denied a temporary restraining order. The Court held, In part, that the HCO is not facially unconstitutional because it clearly serves a legitimate government interest and does not deny all economically viable use of the property. *Harsch Investment Corp. v. City and County of San Francisco*, C-94-0629-DLJ ("TRO Order"), at 4.

In *Djavahari v. City and County of San Francisco*, the Court dismissed a similar challenge to the HCO as moot, when Plaintiff sold the subject of the action, his residential hotel. *See Djavahari v. City. & County of San Francisco*, 1994 U.S. Dist. LEXIS 2546.

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[2] This Court denied a related case motion in *Kardosh v. City and County of San Francisco* on March 8, 1994. On July 1, 1994, Senior Judge William Orrick granted defendants' motion to dismiss the complaint.

Tsang v. City and County of San Francisco was assigned to this Court on September 28, 1993. The case had been filed in the U.S. District Court after the Supreme Court of California denied petition for review of the Appellate Court's decision in favor of defendant. *Tsang v. Superior Court of San Francisco*, 1991 Cal. LEXIS 527. On March 10, 1995, the Court denied plaintiff's motion for a preliminary injunction enjoining the City's enforcement of the HCO and granted summary judgment to the City. C-91-4360- DLJ. The Court found plaintiff's facial challenge time-barred, as-applied challenge not ripe, and substantive due process claim insufficient on the merits.

In *Sparks v. City and County of San Francisco*, plaintiffs, owners of the Pacific Bay Inn, challenged the constitutionality of the replacement housing fee and attorneys fee requirements of the HCO under the Takings Clause of the Fifth Amendment and as violating their rights to procedural and substantive due process. C 94-2398-DLJ. This case was filed in federal court after the plaintiffs were involved in two different state court actions regarding the HCO, where they unsuccessfully raised the unconstitutionality of the HCO as an affirmative defense. The City opposed the motion on the grounds that the statute of limitations had run, principles of res judicata, plaintiffs' as-applied challenges were not ripe, and the Ordinance reasonably relates to legitimate public purposes, thus passing constitutional muster. In May 1995, the Court approved a stipulated action by the parties that the case would be dismissed with prejudice.

Along with the cases in this Court, California state courts were also reviewing similar challenges to the HCO.[3] For example, in *Lambert v. City & County of San Francisco*, hotel owners challenged the City's denial of a conditional use permit under the HCO as unlawful takings. *See Lambert v. City & of San Francisco*, 57 Cal.App.4th 1172, 1177 (1997). The Superior Court held that the denial of the permit was not a takings, and granted summary judgment to the City. *Id.* The California Court of Appeals affirmed this result. It held that the HCO, as well as the denial of a conditional use permit, passed constitutional muster and did not effectuate a takings. *Id.* at 1180. When reaching its decision, the Court discussed how the applicable standard of review for the City's decision was not the strict scrutiny standard of review stated in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), but a more deferential level of review. *Id.* at 1181. The Supreme Court of California denied review. *Lambert v. City & County of San Francisco*, 981 P.2d 41 (Cal. 1999), *cert denied, Lambert v. City & County of San Francisco*, 529 U.S. 1045 (2000).

With the related cases holding the HCO constitutional in the backdrop, the Court continued to review San Remo's case. On August 26, 1996, the Court dissolved the preliminary injunction and granted summary judgment to the City. The Court held: (1) plaintiffs' facial takings claim was barred by the applicable one-year statute of limitations, and there was no basis for applying equitable tolling; (2) plaintiffs' as-applied takings claim was not ripe, and thus the Court lacked subject matter jurisdiction; (3) plaintiff's procedural and substantive due process claims were

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[3] Many of the decisions by the California courts are unpublished.

insufficient on the merits; (4) plaintiff's pendant state law claims were insufficient on the merits; and (5) plaintiffs' request for leave to amend to add an equal protection claim was denied as futile, because their state law action for mandamus review was still pending.

On appeal, the Ninth Circuit affirmed in part and reversed in part. *San Remo v. City and County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998). The Circuit Court held that San Remo's as-applied takings claim was not ripe because an inverse condemnation action had not been pursued in state court. *Id.* at 1102 (citing *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)). The Court then invoked *Pullman* abstention with regard to San Remo's facial takings challenge, staying further proceedings pending San Remo's litigation of their state claims. *Id.* at 1105. *Pullman* abstention is an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions. *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095,1104 (9th Cir. 1998). Pullman abstention is appropriate when: (1) the federal Plaintiff's complaint requires resolution of a sensitive question of federal constitutional law; (2) the constitutional question could be mooted or narrowed by a definitive ruling on the state law issues; and (3) the possibly determinative issue of state law is unclear. *Id.* Once Pullman abstention is invoked by a federal court, the federal plaintiff must then seek a definitive ruling in the state courts on the state law questions before returning to federal court. *Id.* San Remo then amended their state court petition for writ of administrative mandate to add facial and as applied takings claims.

In state court, plaintiffs challenged the administrative determination that they needed a conditional use permit by a petition for writ of administrative mandate. They also challenged the $567,000 fee by paying it under protest and asserting a refund claim under the Mitigation Fee Act. *California Government Code §§ 66000 et seq*. Plaintiffs alleged that the City's legislative enactments and administrative actions that resulted in the $567,000 fee was a takings without just compensation. They alleged both a facial and as-applied challenge to the HCO and all of the City's legislative enactments and administrative actions that resulted in the imposition of the $567,000 fee.

Plaintiffs' state court complaint presented their state law claims, but they explicitly reserved their right to litigate their federal claims in federal court by filing an *England* reservation. *England v. Louisiana State Bd. of Medical Examiners*, 375 U S. 411 (1964). When a federal court abstains from a case and compels a litigant to submit his entire case to state court, the litigant is not compelled to litigate his federal claims in state court. Through an *England* reservation, a party can preserve his right under the abstention doctrine to return to District Court by informing the state courts that he so intends, should the state courts hold against him on the question of state law. *England*, 375 U.S. at 420.

Notwithstanding the reservation, the California Supreme Court discussed and applied federal law throughout the decision. On March 4, 2002, the California Supreme Court issued its decision in favor of the City on all issues. *San Remo v. City and County of San Francisco* ("San Remo II"), 27 Cal.4th 643 (2002). The California Supreme Court affirmed the decision by the state trial court to sustain the City's demurrer to the plaintiffs' takings claims to the HCO and all

administrative decisions, including the actions pursuant to the Planning Code.

On June 4, 2002, San Remo filed their Amended Complaint in this Court. They sought to litigate their federal takings claims. More specifically, they requested: (1) a judicial declaration by this Court that the replacement housing provisions of the HCO and the conditional use authorization requirements of the Zoning Ordinance, separately and in concert with each other, whether facially or as-applied to plaintiffs, violate their rights to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution and that those provisions be declared invalid and unenforceable; (2) an award of damages in the sum of $567,000 plus interest; (3) an award of costs and attorneys fees as permitted by law; and (4) further relief as the Court deemed just and proper.

On October 15, 2002, this Court Ordered that:

1. Both plaintiffs' facial and as-applied federal takings claims with respect to the HCO and to the conditional use permit under the Planning Code must be considered by the Court.

2. Plaintiffs' facial takings claim to the HCO is time barred.

3. Plaintiffs' facial takings claim to the HCO is additionally barred under the doctrine of issue preclusion.

4. Plaintiffs failed to properly allege an as-applied takings claim to the HCO. However, if properly

alleged, an as-applied takings challenge to the HCO is time-barred.

5. Plaintiffs' facial takings claim to the Planning Code is time-barred.

6. Plaintiffs' failed to properly allege an as-applied takings claim to the Planning Code. However, if properly alleged, an as-applied takings claim to the Planning Code is not time-barred.

7. Plaintiff is granted leave to amend to allege an as-applied takings claim to the Planning Code.

On November 14, 2002, plaintiffs filed a Third Amended Complaint. They request: (1) a judicial declaration that the replacement housing provisions of the Hotel Ordinance and the conditional use authorization requirements of the Zoning Ordinance, whether facially or as applied, violate plaintiffs' right to due process under the Fifth and Fourteenth Amendments to the United States Constitution; (2) an award of damages of $567,000 plus interest; (3) an award of costs and attorneys' fees as permitted by law; and (4) further relief as the Court deems just and proper.

For a more detailed description of the factual background, the parties are referred to this Court's October 15, 2002 Order ("October 2002 Order") in *San Remo Hotel et. al. v. City and County of San Francisco et. al.*, C 93-1644-DLJ.

B. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a district Court must dismiss a complaint if it fails to state a claim upon which relief can be granted. When deciding a Rule 12(b)(6)

motion to dismiss, the Court must take all allegations of material fact as true and construe them, and all reasonable inferences therefrom, in the light most favorable to the nonmoving party. *See Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998); *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). The complaint should not be dismissed unless the complainant can prove no set of facts in support of his claim that would entitle him to relief. *Symington*, 51 F.3d at 1484. Even if the face of the pleadings suggests that the chance of recovery is remote, the Court must allow plaintiffs to develop the case at this stage of the proceedings. *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981).

If the Court chooses to dismiss the complaint, it must then decide whether to grant leave to amend. In general, leave to amend is only denied if it is clear that amendment would be futile and "that the deficiencies of the complaint could not be cured by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (quoting *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (per curium)).

When the complainant has attached various exhibits to the complaint, those exhibits may be considered in determining whether dismissal is proper without converting the motion to one for summary judgment, *Id.* (citing *Cooper v. Bell*, 628 F.2d 1208, 1210 n.10 (9th Cir. 1980).

II. DISCUSSION

On October 15, 2002, the Court ruled on the City's Motion to Dismiss San Remo's Amended Complaint. San Remo now prays in their Third Amended Complaint for the same judicial relief that they had requested in their Amended Complaint. Based on the October 2002 Order, San Remo was

only given leave to amend its as-applied takings claim to the Planning Code. Accordingly, the only allegation properly before the Court is the as-applied takings challenge to the Planning Code.

A. As-Applied Takings Claim

The City argues that San Remo's as-applied takings challenge is subject to collateral estoppel because the California Supreme Court adjudicated the same issue in favor of the City. In addition, the City argues that San Remo's as-applied takings challenge fails on the merits.

In its Opposition, in addition to arguing why their claim does not fail on the merits, San Remo argues several reasons why their claim should not be dismissed.

First, San Remo argues that collateral estoppel does not apply because: (1) the Ninth Circuit ordered this Court to abstain under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941); and (2) San Remo invoked *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), thus reserving their federal claims for federal court. San Remo argues that they only presented their federal claims to the state courts so that state laws could be construed in light of their federal claims. Moreover, they argue that the California Supreme Court respected their *England* reservation and did not decide their federal claims.

Second, San Remo argues that even if this Court finds that *England* does not apply, there is no collateral estoppel under California state law, and so this Court should not apply the doctrine of issue preclusion. In support of this argument, San Remo argues that (1) California courts do not apply collateral

estoppel to legal issues, but only to factual issues; (2) the California Supreme Court did not decide its federal claims; (3) under California law, a ruling on a demurrer is given only limited effect in subsequent proceedings; and, (4) California courts do not apply collateral estoppel to a prior decision under a different body of law (and so this Court should not apply the doctrine because the California decision was based on a different body of law- state law).

Finally, San Remo argues that the Court should not apply issue preclusion because the California Supreme Court applied an extremely deferential "rational basis" level of review instead of the "required" heightened *Nollan* and *Dolan* standard *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

Below is a discussion of the application of collateral estoppel through the doctrine of issue preclusion. However, before addressing the doctrinal issue, the Court discusses whether San Remo properly pled an as-applied takings challenge to the Planning Code.

1. Pleadings

The proper categorization of San Remo's claim as facial or as-applied is important, amongst other things, each raises different ripeness and statute of limitations issues. *San Remo II*, 998 F.2d at 686.

A facial challenge to the constitutional validity of a statute considers the text of the legislation itself. In contrast, an as-applied challenge "contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to

consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right." *Tobe v. City of Santa Ana*, 9 Cal.4th 1069, 1084 (1995).

In the context of a constitutional takings claim, a facial challenge involves "a claim that the mere enactment of a statute constitutes a takings," while an as-applied challenge involves "a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 494, (1987).

In order to assert an as-applied challenge, plaintiffs must allege that a particular ordinance is applied differently to their particular property than to other similarly situated property owners. For example, in *Travis v. County of Santa Cruz*, the petitioner argued that the County exceeded its authority by imposing certain occupancy restrictions, rent controls and deed restrictions as mandatory conditions upon granting development of specified property. *Travis*, 122 Cal.Rptr.2d 713 (2002). The Court held that the petitioners failed to assert an as-applied takings challenge, despite their arguments to the contrary. *Id.* at 721. It reasoned that because the petitioners did not "clearly allege" that any of the imposed conditions differed in any way from conditions imposed on other applicants for permits, or that the Ordinance had a disparate fiscal effect on them as compared to other similarly situated proper owners, their claim was only facial. *Id.*;*Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal.4th 952, 961, (1999).

Similarly, in *Levald*, the Ninth Circuit found that the plaintiffs failed to "clearly" allege an as-applied takings challenge. *Levald*, 998 F2d at 686. The Court reasoned that the payment required in the statute at issue, though the

amount might vary amongst property owners, arose not based on a particular application of the statute, but solely from the existence of the statute itself. *Id.*

Turning to this case, the Court finds that San Remo has properly pled an as-applied takings challenge to the Planning Code. In its Third Amended Complaint, San Remo alleges essential facts that were absent from its previous Complaint. San Remo added paragraphs 39-41, 45 and 46. Most notable is paragraph 45, in which plaintiffs allege: "Plaintiffs are informed and believe and therefore allege that the City has never imposed both a condition of payment of a replacement housing fee and a requirement of lifetime leases for existing tenants on a conditional use permit for the conversion of residential hotels rooms to tourist use."

At this stage, the Court must accept the allegations of the Complaint as true. As a result, San Remo has properly alleged an as-applied challenge to the Planning Code. The issue now becomes whether or not this Court should apply the doctrine of issue preclusion. As discussed below, the Court finds that the doctrine applies and bars litigation of San Remo's Third Amended Complaint.

2. The Doctrine of Issue Preclusion Applies

As already noted, San Remo argues that the Court should not apply issue preclusion because: (1) *Pullman* abstention and their *England* reservation; (2) California courts would not apply the doctrine in this situation; and, (3) the California Supreme Court applied an extremely deferential "rational basis" level of review instead of the "required" heightened *Nollan* and *Dolan* standard. Each issue is addressed in turn.

a. *Pullman* Abstention and the *England* Reservation

Remo argues that collateral estoppel does not apply because: (1) the Ninth Circuit ordered this Court to abstain under *Pullman*; and (2) San Remo reserved federal claims for federal court through an *England* reservation. In this Court's October 2002 Order, the Court thoroughly analyzed the interplay of *Pullman* abstention and San Remo's *England* reservation. After a full discussion of the applicable law, the Court concluded that neither *Pullman, England* nor the other decisions cited to by San Remo in support of this argument bar the Court from applying collateral estoppel through the doctrine of issue preclusion in this. case. *See October 2002 Order*, p 48-52. For the same reasons, as discussed below, the doctrine of issue preclusion is applicable and plaintiffs are precluded from re-litigating their claims in federal court.

The Ninth Circuit held in *Dodd II* that a previous *England* reservation of a federal takings claims does not prevent operation of the issue preclusion doctrine. *Dodd II*, 136 F.3d 1219 (1998) In *Dodd II*, Dodd filed a suit under *section 1983* in federal court alleging a takings in violation of the Fifth and Fourteenth Amendments. The District Court dismissed the claim as unripe. The Dodds appealed. However, because the Oregon Supreme Court decided the case during the pendency of the appeal, the Ninth Circuit determined that the federal issue was ripe and remanded. When arguing before the Oregon state courts, the Dodds explicitly asked the Oregon courts to refrain from addressing the takings issue under federal law by making an *England* reservation. On remand, the District Court determined that, despite the Dodd's *England* reservation, their federal claims were barred under the doctrine of issue preclusion.

The Ninth Circuit upheld this result. The Ninth Circuit stated "[n]or does the Dodd's previous reservation of this federal takings claim under the doctrine of *England* prevent operation of the issue preclusion doctrine." *Id*. at 1227. The Court found that, "to the extent a party fully litigates a necessary issue in the course of a state proceeding that is identical to an issue before the federal court, they are precluded from taking a second bite of the apple." *Id*. The Court did note, however, that a party can effectively reserve claims for federal court under the *England* doctrine. *Id* at 1227 (emphasis added).

In *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992), homeowners brought a civil rights action against the Tampa airport based on claim that flights over their property constituted a takings. The homeowners filed suit in Manatee County Circuit Court, raising only state claims. After losing in state court, the homeowners filed suit in federal court under federal law. The district court dismissed the suit on issue preclusion principles. The Eleventh Circuit upheld this result. In doing so, the Eleventh Circuit recognized the jurisdictional problem created by the interplay of *28 U.S.C. 1738*[4] and the Supreme Court's holding in *Williamson County*[5]. On the one hand, *Williamson County*

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[4] Pursuant to *28 U S.C. 1738*, "... Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

[5] In *Williamson County*, the Supreme Court held that a takings claim is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding

requires potential federal court plaintiffs to pursue any available state court remedy that might lead to just compensation. On the other hand, if a litigant brings a takings claim under the relevant state procedure, he runs the risk of being barred from returning to federal court. *Id.* at 1301. The Court also recognized that the Supreme Court has not made a definitive ruling on the interplay of this case law. *Id.*; *Allen v. McCurry*, 449 U.S. 90, 101, 103-04 (1980).

The Eleventh circuit resolved the dilemma by finding that a litigant involuntarily in state court, such as under *Williamson County*, can avoid issue preclusion through a *Jennings* reservation. *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir. 1976). A *Jennings* reservation allows a plaintiff in state court to reserve the right to bring federal claims in federal court should the state court find adversely to plaintiffs. When Coming to this conclusion, however, the Court noted how it questioned the continued validity of *Jennings*, but was reluctant to overrule the case because it was "too late in the day" to do so. *Id.* It also stated how "If a *Jennings*-type reservation is not available in *section1983* actions rising takings claims, 'plaintiffs could never obtain a hearing on their federal constitutional claims in federal court'" *Id.* at 1307, quoting *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291, 298 n. 1 (5th Cir. 1979). There is no *Jennings* reservation in this case.

San Remo argues that the *Dodd I* and *Fields* cases are inapplicable, though both involved and discussed an *England* reservation, because neither involved *Pullman* abstention. The Court rejects this argument and find that both apply and

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the application of the regulations, to the property at issue. *Williamson County*, 473 U.S. at 186.

support application of issue preclusion in this case. Neither decision is dependent on the fact that there was no *Pullman* abstention. Instead, both stress how litigants in state court, even if they are there involuntarily and invoke an *England* reservation, could be barred from later litigation in federal court by the doctrine of issue preclusion.

In addition to the reasoning of the *Dodd II* case, the City argues that issue preclusion should apply because San Remo voluntarily litigated their claims in state courts. It argues that the whole rationale for an *England* reservation and San Remo's argument as to why issue preclusion should not apply is inapplicable in ths case based on San Remo's voluntary decision to litigate in state court. As such, it argues that the failure of this Court to apply the doctrine would lead to the type of forum shopping that issue preclusion is designed to prevent.

San Remo argues that a plaintiff should not be required "without his consent and through no fault of his own, to accept instead a state's court's determination of [its federal] claims." However, in the Ninth Circuit case, it was plaintiffs who urged the Court to apply *Pullman* abstention. As stated in the Ninth Circuit decision: "Ironically, it is Field who urge us to abstain under *Pullman*. Normally, of course, *Pullman* abstention is invoked by the defendant, not only because it is the plaintiffs who initially chose the federal forum (and thus presumably wants it), but because *Pullman* abstention tends to delay resolution of the plaintiff's constitutional claims. Unsurprisingly, the City views Field's request for abstention as an outrageous act of chutzpah, and argues that Field should be stuck with the federal forum he chose. Although we have some sympathy for the City's position, we agree with Field that a plaintiffs may raise *Pullman* abstention just as a

defendant may, and he may do so for the first time on appeal." *San Remo*, 145 F.3d at 1104 05.

The Court agrees with the City that San Remo voluntarily litigated its claims in state court. As discussed in the case before the Ninth Circuit, it was plaintiffs who urged the court to abstain under *Pullman*. *See San Remo I*, 145 F.3d at 1104-05. For this reason, as well as the reasoning discussed above, plaintiffs are precluded from re-litigating their claims in federal court.

b. California Courts and Collateral Estoppel

San Remo argues that California courts would not apply collateral estoppel in this case for four reasons. San Remo made the same arguments when its Amended Compliant was before the Court. In the October 2002 Order, the Court thoroughly analyzed and rejected these arguments. For the same reasons, as discussed below, the Court finds that none of these arguments bar the Court from applying the doctrine of issue preclusion.

First, San Remo argues that collateral estoppel should not apply because California courts only apply the doctrine to factual and not legal issues.

The Court rejects San Remo's argument. California courts have consistently applied collateral estoppel to questions of law. *See, e.g., Rutherford v. State of California*, 233 Cal. 781 (1987); *United States Fire Insurance Company v. Hans F. Johansen*, 270 Cal.App.2d 824 (1969); *Pacific Maritime Assn. v. California Unemp. Ins. Appeals Board*, 236 Cal.App.2d 325, 334 (1965). When a question of law essential to a judgment is actually litigated and determined by a valid and final judgment, it is conclusive on a later action

that arises out of the same subject matter or transaction, unless injustice would result. *Johansen*, 270 Cal.App.2d at 834-35. In this case, San Remo does not argue, nor would there be, any injustice from applying issue preclusion. The issues of law decided by the state Supreme Court arise out of the exact same transaction at issue in this case.

Second, San Remo argues that California courts give only limited effect in subsequent proceedings to a ruling on a demurrer.

The Court rejects this argument. In California collateral estoppel applies when an issue is actually litigated and determined on a motion to dismiss for failure to state a claim, a motion for a directed verdict, or their equivalents. *Barker v. Hill*, 191 C.A.3d 221 (1987). Courts do not make a distinction when applying the doctrine based on the form of the ruling. In fact, it is not even necessary that an "exhaustive adversarial hearing" is conducted in order to preclude re litigation. *Briggs v. Lawrence*, 230 C.A.3d 605, 611 (1991).

Third, San Remo argues that their federal takings claim is not barred because they are asserting "a different- albeit closely related- cause of action."

The Court also rejects this argument. California courts will not apply collateral estoppel if the second action concerns new facts or circumstances. *Oro Fino Old Mining Corp. v. El Dorado*, 225 C.A.3d 872, 878 However, the courts consistently apply it for issues raised, even when some factual matters or legal arguments which could have been presented were not. *Id*. This is true even if the unraised arguments or facts would have produced an opposite result if they had been raised. *Mattz v. Superior Court*, 250 Cal.Rptr. 278 (1988). In this case, San Remo is arguing a violation of the Takings

Clause based on identical facts and circumstances argued before the state courts, San Remo has not alleged any new changes since the California Supreme Court decision on March 4, 2002. Even assuming San Remo seeks to argue additional facts and arguments that it failed to argue before the state court, collateral estoppel still applies.

Finally, San Remo contends that the "interpretation of a written document- without considering any extrinsic evidence" in a first action is not given preclusive effect in a second action, citing *Johansen*, 270 Cal.App.2d 824 (1969). However, the *Johansen* case does not stand for such a proposition. In *Johansen*, the Court invoked the exception to collateral estoppel because, based on the individual circumstances of the case, application of the doctrine would result in "grave injustice." *Id*. at 834. Neither it, nor other California court decisions, invoke the rule urged by San Remo.

c. Level of Review

San Remo argues that this Court should not apply the doctrine of issue preclusion because the California Supreme Court applied an extremely deferential "rational basis" level of review instead of the "required" heightened *Nollan* and *Dolan* standard. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

In the October 2002, the Court throughly analyzed, this issue and found that the heightened *Nollan* and *Dolan* standards do not apply to this case. For the same reasons as discussed below, the Court finds that *Nollan* and *Dolan* do no not prevent the Court from applying the doctrine of issue preclusion.

As discussed in the October 2002 Order, even if this Court were free to disregard the findings of the California Supreme Court, the Court finds that the heightened *Nollan* and *Dolan* standards do not apply to this case.

In *Nollan*, the Supreme Court was presented with a case where the California Coastal Commission required, as a condition to approval of a rebuilding permit, that owners provide the public an easement to pass across a portion of their property. After recognizing how a land use regulation does not effect a takings if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land, the Court found that the Commissioner's condition did not meet "even the most untailored" standard of means-end scrutiny, and thus required the payment of just compensation. *Nollan*, 483 U.S. at 834, 838, *citing Agins v. City of Tiburon*, 447 U.S. 255 (1980). While the Court did not elucidate with any precision the required means-end fit, it did caution that judicial scrutiny would be searching when "the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective. *Id*. at 841.

Despite the fact that the standard articulated in *Nollan* was not explicitly conditioned on the taking of a possessory land interest, after *Nollan*, the Ninth Circuit decided in *Commercial Builders* that the correct standard for analyzing a regulation which does not exact a possessory land interest is the more permissive rational relationship test found in its earlier decision, *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983). *Commercial Builders*, 941 F.2d 872, 874 (9thCir. 1991).

In *Commercial Builders*, appellants challenged an Ordinance by the City of Sacramento to help expand available low income housing. The Ordinance conditioned certain types of nonresidential building permits upon the payment of a fee intended to offset the burdens on the city caused by low-income workers who moved there to fill jobs created by the project in question. The Ninth Circuit held that the Ordinance in question did not work an unconstitutional takings because it was reasonably related to its stated purpose. *Id.* at 874-875. The Court rejected appellants argument that *Nollan* imposes a more stringent level of review for ordinances that place conditions on development; it further rejected the argument that the Ordinance must substantially advance its stated purpose. *Id.* In reaching its decision, the Ninth Circuit noted how none of the Circuits that considered the constitutionality of ordinances placing burdens on land use after *Nollan* interpreted the case as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land. *Id.* citing *St. Bartholomew's Church v. City of New York*, 914 F 2d. 348, 357 n.6 (2d Cir.1990), *cert. denied sub nom. Committee to Oppose Sale of St. Bartholomew's Church v. Rector*, 499 U.S. 905 (1991); *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732, 737 (5th Cir.1988); *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 178 (4th Cir.1988). The Court also rejected appellant's argument that the fee represented a transfer of property, and therefore more closely resembled a physical taking of property. The Court reasoned "Under appellants' theory, however, compensation would be required for every fee; therefore, every fee would be unconstitutional. We see no valid basis for such a rule." *Id.* at 875.

The Supreme Court's more recent decision, *Dolan v. City of Tigard*, 114 S.Ct. 2309, 2316 (1994), does not undercut

the explicit distinction drawn by the Ninth Circuit in *Commercial Builders*. Thus, Ninth Circuit precedent imposes a deferential level of review for ordinances that do not involve a physical taking.

In *Dolan*, the Supreme Court was presented with a situation similar to that in *Nollan*, where a government agency conditioned a development permit on dedication of a portion of the applicant's land. As such, the Court elaborated on the question it had reserved in *Nollan* namely the "required degree of connection between the exactions and the projected impact of the proposed development." *Dolan,* 512 U S at 386. It discussed that while no "precise mathematical calculation is required," a standard of "rough proportionality best encapsulates what we hold to be the requirement of the Fifth Amendment" *Id.* at 391. However, when elaborating and applying this "heightened scrutiny," the Court distinguished both the *Dolan* and *Nollan* cases from "other land use cases that involve essentially legislative determinations classifying entire areas of the city" or when "conditions imposed are simply a limitation on the use petitioner might make of her own parcel," where a more deferential standard is utilized. *Id.* at 385. It noted how, when evaluating generally applicable zoning regulations, "the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights." *Id.* at 391fn. 8, *citing Village of Euclid v Ambler Realty Co.*, 272 U.S. 365 (1926).

In this case, as discussed by the California Supreme Court, the HCO does not provide City staff or administrative bodies with discretion as to the imposition or size of the housing replacement fee, and it applies the Ordinance without discretion or discrimination to every residential hotel in the city. *San Remo II*, 27 Cal 4th at 668. The City did not require

dedication of any of Remo's property as in *Nollan* or *Dolan*, nor did it require compliance with the statute in an arbitrary manner. As such, the heightened *Nollan* and *Dolan* standard do not apply in this case. The California Supreme Court utilized an appropriate level of scrutiny.

3. The Doctrine of Issue Preclusion

The collateral estoppel effects of a former adjudication are collectively referred to by most commentators as the doctrine of "res judicata." *See* Restatement (Second) of Judgments, Introductory Note before ch. 3 (1982); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4402 (1981). Collateral estoppel or "res judicata" is often analyzed further, to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." *Migra v. Warren City School Dist. Bd of Educ.*, 465 U.S. 75, 77 n. 1 (1984). "Claim preclusion" refers to the preclusive effect of a judgment in foreclosing re-litigation of claims that were raised or should have been raised in earlier litigation. *Id.* "Issue preclusion" refers to the preclusive effect of a judgment in foreclosing re-litigation of issues that have been actually and necessarily decided in earlier litigation. *Id.*

Under the doctrine of claims preclusion, "[A] valid final adjudication of a claim precludes a second action on that claim or any part of it." *Baker ex rel. Thomas v. General Motors Corp.*, 522 U.S. 222, 233 n. 5 (1998).

Under the doctrine of issue preclusion, a valid and final determination in one proceeding of a necessary factual or legal issue may not be re-litigated in a subsequent proceeding involving a party to the prior action. *See Dodd v. Hood River County* ("Dodd II"), 136 F.3d 1219, 1224 (9th Cir. 1998).

Pursuant to the Full Faith and Credit Act, 28 U.S.C. § 1738, federal courts must "give a state court judgment the same preclusive effect as would be given to that judgment under the law of the state in which the judgment was rendered." *Migra v. Warren School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Therefore, California law on issue preclusion dictates our analysis. *Dodd II*,136 F.3d at 1225.

San Remo alleges that the replacement housing fee and identical issue raised before the California Supreme Court and so the doctrine of issue preclusion, and not claims preclusion, is applicable in this case. Nonetheless if San Remo was asserting a different claim and the doctrine of claims preclusion did apply, their claim would still be barred. Under California law, collateral estoppel applies both to claims actually litigated in a prior proceeding, and, as the case would be, to claims which could have been litigated *See Patrick Media Group, Inc. v. California Coastal Com.*, 9 Cal.App.4th 592, 617 (1992).

a. California Law

California Courts apply the doctrine of collateral estoppel to attempts to re-litigate the same issue in a later action. *Griset v. Fair Political Practices Com.*, 25 Cal.4th 688, 701-02 (2001). Collateral estoppel bars re-litigation of an issue decided at a previous proceeding if: (1) the issue decided in the prior case is identical with the one now presented; (2) there was a final judgment on the merits in the prior case; and, (3) the party to be estopped was a party to the prior adjudication. *Stolz v. Bank of America*, 15 Cal. 4th 127, 222 (1993). Accordingly, if the substantive laws of takings in California and federal courts are coextensive, issue preclusion applies to any takings issues that were decided in California state courts that are later brought in federal court. *Dodd v.*

Hood River County ("Dodd I"), 59 F.3d 852, 861 (9th Cir. 1995).

Under the takings clause of the California Constitution (art. I, § 19), "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into Court for, the owner." The federal takings clause (U.S. Const., 5th Amend.) provides: "nor shall private property be taken for public use without just compensation." Aside from protecting "a somewhat broader range of property values" than the corresponding federal provision, California construes both the federal and state clauses congruently *San Remo II*, 27 Cal.4th at 664; *Hensler v. City of Glendale*, 8 Cal.4th 1, 9, fn. 4 (1994). Thus, because the substantive laws of takings in California and federal courts are coextensive, collateral estoppel applies through the doctrine of issue preclusion when the three-part California test is met.

b. Application of the Three Part Test

The Court finds that San Remo's claim is barred by collateral estoppel through the doctrine of issue preclusion. All three-parts of the test for applying the doctrine of issue preclusion are satisfied.

One, the Court finds that the issues decided in the prior case are identical to the issues presented in the instant case. In state court, San Remo "alleged both a facial challenge to the Hotel Ordinance and an as-applied challenge to all of the City's legislative enactments (which includes both: the HCO and the Planning Code) and administrative actions that resulted in imposition of the $567,000 fee" (which includes the conditional use permit issued to San Remo) San Remo's Memorandum in Opposition to Dismiss ("Opposition"), page

9. In state court, San Remo challenged both the imposition of the fee and the life time lease requirement *See e.g., San Remo*, 27 Cal.4th at 648, 678. San Remo is now raising the identical issues in their Third Amended Complaint. They are again alleging an as-applied takings challenge to the Planning Code based on the fee and life-time lease requirements imposed in the conditional use permit. As a result, the first prong of the three-part test is satisfied.

Second, the Court finds that there was a final judgment on the merits in the prior case. The final judgment on the merits resolved the identical issues now before the Court. The California Supreme Court sustained the City's demurrer to the plaintiffs' takings claims. As a result, the Court necessarily decided San Remo's as-applied Takings Challenge to the Planning Code based on the imposition of the fee and life-time lease requirement. As a result, the second prong of the three-part test is satisfied.

Finally, the party to be estopped was a party to the prior adjudication. San Remo was a party to the California Supreme Court case. As a result, the third prong of the three-part test is satisfied and San Remo is precluded from litigating its suit in federal court.

B. San Remo's Claim on the Merits

The City argues that even if the Court did not apply the doctrine of issue preclusion, it must dismiss San Remo's claim for failure to state a claim on the merits. Because the Court finds that San Remo's claims are precluded, the Court does not find it necessary to address this argument.

III. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS defendants' motion to dismiss plaintiffs' Amended Complaint. On the circumstances presented here, it appears that any possible basis for the as-applied takings claim has been pleaded and that it would be futile to allow any further opportunity to amend. Accordingly, the dismissal of plaintiffs' Amended Complaint is without leave to amend.

Dated: April 16, 2003

/s/ _____
D. Lowell Jensen
United States District Judge

APPENDIX D

U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

No. C- 93-1644-DLJ

[Filed October 15, 2002]

SAN REMO HOTEL L.P,
THOMAS FIELD, ROBERT FIELD, AND
T&R INVESTMENT CORP.,
Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation, on behalf of the
DEPARTMENT OF CITY PLANNING,
CITY PLANNING COMMISSION,
AND BOARD OF SUPERVISORS,
Defendants.

ORDER

On September 6, 2002, the Court heard arguments on defendants' motion to dismiss plaintiffs' Amended Complaint. Andrew W. Schwartz appeared on behalf of defendants; Paul F. Utrecht and Andrew M. Zacks appeared on behalf of

plaintiffs ("San Remo"). R.S. Radford appeared on behalf of the Pacific Legal Foundation ("PLF") as amicus curiae. Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby GRANTS defendants' motion.

I. BACKGROUND

A. Factual Background and Procedural History

Plaintiffs, Thomas and Robert Field (the "Fields"), own and operate the San Remo Hotel, a 62-unit property in San Francisco. When plaintiffs ("San Remo") purchased the hotel in 1971, it was zoned commercial and there were no restrictions on tourist or commercial use of the property. Amended Complaint for Declaratory Relief and Damages, dated June 4, 2002 (the "Complaint") ¶ 9. Intending to operate the San Remo as a tourist hotel, plaintiffs expended more than $250,000 to make the repairs required to bring the San Remo into compliance with housing, building and fire codes governing commercial/tourist hotels. Complaint ¶ 10.

Plaintiffs allege that, after renovations were completed, the guest rooms at the San Remo have been rented primarily to transient and tourist guests on a commercial basis, with the majority of their rental business taking place during the summer months. Complaint ¶ 11. Every year from 1970 until the present, the City has licensed the San Remo as a tourist hotel. Complaint ¶ 11.

1. The 1981 Hotel Ordinance

In 1981, the City enacted the Residential Hotel Unit Conversion and Demolition Ordinance ("HCO"), which established certain conditions that owners would have to meet

when they sought to convert residential hotel units to nonresidential tourist use.[1] *San Francisco Admin. Code*, Chapter 41. A study by the Department of City Planning showed that between 1975 and 1979 almost 20% of the residential hotel units in the City were lost due to demolition and conversion, primarily to tourist use. *HCO* § 41.3 (d). The stated purpose of the HCO is "to benefit the general public by minimizing adverse impact on the housing supply and on displaced low-income, elderly and disabled persons resulting fromthe loss of residential hotel units through their conversion and demolition." *HCO* § 41.2.

Under the HCO, units can be converted from residential to nonresidential use only if the owner obtains a permit to convert. The City will grant a permit only if the property owner provides relocation assistance to hotel residents and replaces the residential hotel units being converted through one of the following methods: (1) constructing an equal number of replacement units, (2) rehabilitating an equal number of residential hotel units, or (3) contributing an 'in lieu' fee to the City's Residential Hotel Preservation Fund Account in the amount of 100 percent of the acquisition cost and 40 percent of the construction costs of the number of units converted. *HCO* §§ 41.12 and 41.13; *see also Bullock*, 221 Cal. App.3d at 1081. The 1981 Hotel Ordinance allowed unlimited tourist use of residential units during the summer months of May 1 to September 30. *HCO* § 41.16(a) (3) (b).

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[1] The HCO was originally enacted in 1979 as a "temporary moratorium." In 1981, a permanent HCO was enacted. *Bullock v. City and County of San Francisco*, 221 Cal. App. 3d 1072, 1080 (1990) (discussing history of the San Francisco Residential Hotel Unit Conversion and Demolition Ordinance).

The HCO defines a "residential unit" as a hotel "guest room" that was occupied by a "permanent resident" as of September 23, 1979. HCO § 41.4(b)(1). To determine the number of "residential units" existing as of September 23, 1979, a survey was sent to operators of hotels. After receiving the survey responses, the City certified the number of units that each property owner was required to maintain for residential use pursuant to the HCO. *See HCO* § 41.6.

The San Remo's survey questionnaire was sent to the hotel and answered by Jean Iribarren, who leased the hotel from plaintiffs. Complaint ¶ 21. Mr. Iribarren reported that the San Remo units were residential. According to plaintiffs, Mr. Iribarren did not speak fluent English and his response to the survey that all of the San Remo's rooms were occupied by residents was a false statement. Complaint ¶ 21. Plaintiffs claim they were not given notice that the City was conducting the survey, nor were they notified of Mr. Iribarren's responses. Complaint ¶ 22. A copy of the certificate of use was physically posted at the hotel in 1981.[2]

Based upon Mr. Iribarren's responses to the survey, the City issued a Certificate of Use authorizing the operation of 62 residential units and zero tourist units at the San Remo. Complaint ¶ 24. No appeal of the unit status determination was filed and the Certificate of Use became final. Complaint ¶ 22. Plaintiffs claim that they could not have filed an appeal because they had no notice of either the false declaration or the City's initial usage report. Complaint ¶ 22. They argue that they were unaware of the 1981 survey that established the

[2] Under the HCO, the City-issued certificate of use was required to be posted in the hotel lobby when issued in 1981. *HCO* § 41.6(d).

hotel's initial status, and that they did not know of the hotel's classification until 1983. However, they allege no facts in their complaint that indicate they were prevented by City action from learning of and participating in the survey and certification process. Moreover, under the HCO, the City-issued Certificate of Use, from which plaintiffs could have appealed, was required to be posted in the hotel lobby when issued in 1981. *HCO* § 41.6(d). Even when they took possession in 1983, plaintiffs made no effort to correct the allegedly incorrect designation. *San Remo II*, 27 Cal.4th at fn. 17. They waited until 1987 to even draw it to the City's attention by letter. *Id*.

2. The 1990 Hotel Ordinance

In May 1990, the City repealed the 1981 version of the HCO and enacted a new version. The 1990 HCO no longer allows unlimited summer tourist use of residential units. It allows 100% use of residential units for tourists during the summer, if specified conditions are met, but limits the use of residential units for tourists to 25% if those conditions are not met.[3] It also increased the replacement housing fee amount from 100% of the cost of an acquisition plus 40% of the costs of construction of a replacement unit to 100% of the cost of an acquisition plus 80% of the costs of construction of a

[3] "An owner is prohibited from renting more than 25% of the hotel's residential units for non-residential or tourist use from May 1st until September 30th unless the owner or operator can demonstrate that: (i) the requirements of 41.19 (a)(3) above are met, (ii) good-faith efforts were made to rent such units to perspective permanent residents at fair market value for comparable units and that such efforts failed and (iii) the owner and operator has not committed unlawful action as defined in this Chapter within 12 months prior to this request." HCO§ 41.9.

replacement unit. *HCO* § 41.13 (a)(4). This fee increase, however, was not imposed on the San Remo, as the 1990 HCO allowed certain owners, including the San Remo, to invoke the 40% replacement housing fee under the 1981 Ordinance rather than the new 80% fee. *HCO* § 41.13(d).

3. The North Beach Zoning Ordinance

The HCO is wholly separate from the City's zoning laws, which independently restrict conversion of residential property in some zoning districts. *HCO* § 41.13. The HCO explicitly provides in § 41.4(s): "Designation as a tourist unit under this Chapter shall not supersede any limitations on use pursuant to the Planning Code. An owner must therefore comply with applicable zoning restrictions in addition to the HCO." *HCO* § 41.4(s).

In 1987, the Planning Commission and Zoning Administrator of the City adopted the North Beach Neighborhood Commercial District Zoning Ordinance ("NBNCD"), which changed the Planning Code applicable to tourist hotels in the zoning district in which the San Remo is located. *Planning Code §§ 722.1 et seq.* An owner seeking to convert a residential use to a tourist hotel is required to secure a conditional use permit from the City Planning Commission. *Id.* at § 722.55. However, owners who establish a prior non-conforming commercial use are exempt from the conditional use permit requirement. Complaint ¶ 18.

Although enacted in 1987, the NBNCD classifies residential hotels based upon their actual use on September 23, 1979, the same date established for the HCO. Thus, although plaintiffs claim that the hotel was being used as a summer tourist hotel at the time the NBNCD was enacted, under the terms of the NBNCD, plaintiffs were required by

the City to obtain a conditional use permit to operate the San Remo as a tourist hotel.

4. Administrative Proceedings

In May 1990, plaintiffs filed an application under the HCO for a permit to convert the San Remo's 62 residential units to tourist use under the 1990 HCO. Complaint ¶ 23. Plaintiffs allege that the City refused to act on the application until 1997. *Id.*

After plaintiffs filed the conversion application, the Planning Department informed plaintiffs that the Zoning Ordinance defines the rooms at the San Remo as group housing units and therefore plaintiffs needed to obtain a conditional use permit under the Planning Code to convert their 62 group housing units into a tourist hotel. Complaint ¶ 24.

In July 1990, plaintiffs complied with the Planning Department's request and filed an application for a conditional use permit under protest. Complaint ¶ 26.

In June 1992, the plaintiffs invoked the protections of the Permit Streamlining Act (*California Government Code § 65920 et seq.*) to compel the City to act on its permit application. Complaint ¶ 26. On August 20, 1992, allegedly in direct response to plaintiffs' invocation of the Permit Streamlining Act, the City scheduled a public hearing on plaintiffs' application for a conditional use permit. Complaint ¶ 27.

On the day of the public hearing, the City Attorney informed plaintiffs that the Planning Commission did not have jurisdiction to adjudicate their claim. *Id.* It further advised

plaintiffs that only the City's Board of Permit Appeals ("BPA") could make any of the requested findings. As a result plaintiffs agreed to delay the Planning Commission hearing so the BPA could hear their claims. *Id*.

On September 9, 1992, the Zoning Administrator issued a written determination that the San Remo was not zoned for commercial use and needed a conditional use authorization in order to rent their units to tourists. Complaint ¶ 28.

On or about September 21, 1992, plaintiffs appealed the decision of the Zoning Administrator to the BPA, arguing that the Zoning Administrator improperly applied the relevant Planning Code provisions, and that the classification denied plaintiffs due process of law, equal protection, and constituted a takings without just compensation. Complaint ¶ 29.

On December 9, 1992, the BPA upheld the determination of the Zoning Administrator. Complaint ¶ 30. The Board stated it could not rule on the constitutionality of the laws involved in the case. *Id*.

After plaintiffs' request for a rehearing was denied on January 13, 1993, the BPA's decision and order became final. Complaint ¶ 31.

On January 21, 1993, after a public hearing, the Planning Commission approved plaintiffs' application for a conditional use permit upon satisfaction of the following conditions:

> (1) Plaintiffs must mitigate the loss of the 62 residential hotel units by paying 40% of the cost of replacement housing, which equals $567,000;

> (2) Plaintiffs must offer "lifetime leases" to existing long-term tenants; and
>
> (3) Plaintiffs must seek and justify variances from the parking and floor area ratio limitations of the NBNCD. Complaint ¶ 32.

On April 19, 1993, the San Francisco Board of Supervisors rejected plaintiffs' administrative appeal of the conditional use permit and upheld the replacement housing condition imposed by the Planning Commission. Complaint. ¶ 34.

5. Procedural Status

On May 4, 1993, plaintiffs filed the instant action in U.S. District Court. At the same time, plaintiffs filed a petition for a writ of administrative mandate in state court challenging the decision of the City's Board of Permit Appeals requiring the San Remo to obtain a conditional use permit to convert to a permanent tourist hotel.[4] In federal court, the San Remo case was related to another case already pending before U.S. District Judge Vukasin, *Golden Gate Hotel Ass'n v. City and County of San Francisco*, 836 F .Supp. 707 (N.D. Cal. 1993). In the related case of *Golden Gate*, a group of hotel owners brought suit under *section 1983*, Claiming the HCO violated the Takings Clause of the Fifth Amendment.

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[4] Following the Ninth Circuits decision in *San Remo v. City and County of San Francisco*, 145 F.3d.1095, as discussed below, San Remo amended its state court action to assert facial and as-applied takings claims.

In July 1993, plaintiffs moved for a preliminary injunction prohibiting the City from enforcing the HCO against San Remo. While this matter was pending, on September 9, 1993, Judge Vukasin declared the HCO unconstitutional on its face in *Golden Gate*. On September 16 1993, based on the ruling in *Golden Gate*, Judge Vukasin granted plaintiffs' preliminary injunction in the instant case. The Order enjoined the City from requiring compliance with any condition of approval or taking any steps to prohibit plaintiffs from using the San Remo as a commercial tourist hotel. The City filed a notice of appeal and an emergency motion for a stay of the preliminary injunction. The Ninth Circuit denied the motion for stay and the City thereafter abandoned its appeal.

On September 28, 1993, San Remo's case was assigned to this Court.

On January 24, 1994, San Remo filed a first amended complaint. Plaintiffs' amended complaint challenged the constitutionality of the HCO and the validity of the replacement housing condition in the conditional use permit issued to plaintiffs by the City Planning Commission. Counts One and Two of the First Amended Complaint sought declaratory and injunctive relief, respectively, on the grounds that the Planning Commission's imposition of a replacement housing condition in granting the conditional use permit violated plaintiffs' rights to procedural and substantive due process. Counts Three and Four alleged that the HCO affects an unconstitutional takings of plaintiffs' property, both on its face and as-applied. Count Five was a derivative claim that sought damages based on the above-alleged constitutional violations. Count Six was a pendant state law claim under the California Permit Streamlining Act.

Beginning in March 1994, subsequent developments in the courts eroded the basis for the preliminary injunction granted to San Remo. On March 18, 1994, the Ninth Circuit vacated, reversed, and remanded the decision in *Golden Gate* for a determination as to whether appellants' complaint was time-barred under the applicable statute of limitations. *See Golden Gate Hotel Ass'n. v. City and County of San Francisco*, 18 F.3d 1482 (9th Cir. 1994) On remand, *Golden Gate* was assigned to this Court.

On remand, in *Golden Gate*, this Court entered judgment for the City, finding the action time-barred by the applicable statute of limitations and thus dismissing the case. *See Golden Gate Hotel Ass'n v. City & County of San Francisco*, 1994 U.S. Dist. LEXIS 11313 (N.D. Cal. Aug. 2, 1994). On appeal, the Ninth Circuit affirmed this district court's order. *See Golden Gate Hotel Ass'n. v. City and County of San Francisco*, 76 F.3d 386 (Table) (9th Cir 1996), *cert denied*, 519 U.S. 808 (1996).

At the same time as *Golden Gate*, other cases challenging the HCO and related to *Golden Gate* were also assigned to this court. In addition to the related case of *San Remo*, this Court was assigned *Harsch Investment Co v. City & County of San Francisco, Djavahari v. City & County of San Francisco, Tsang v. Superior Court of San Francisco*, and *Sparks v. City and County of San Francisco.*[5]

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[5] This Court denied a related case motion in *Kardosh v. City and County of San Francisco* on March 8, 1994. On July 1, 1994, Senior Judge William Orrick granted defendants' motion to dismiss the complaint.

In *Harsch Investment Corp. v. City and County of San Francisco*, plaintiff alleged virtually the same claims as San Remo, and was represented by the same counsel. On June 21, 1994, this Court denied a temporary restraining order. The Court held, in part, that the HCO is not facially unconstitutional because it clearly serves a legitimate government interest and does not deny all economically viable use of the property. *Harsch Investment Corp. v. City and County of San Francisco*, C-94-0629-DLJ ("TRO Order"), at 4.

In *Djavahari v. City and County of San Francisco*, the Court dismissed a similar challenge to the HCO as moot, when plaintiff sold the subject of the action, his residential hotel. *See Djavahari v. City & County of San Francisco*, 1994 U.S. Dist. LEXIS 2546.

Tsang v. City and County of San Francisco was assigned to this Court on September 28, 1993. The case had been filed in the U.S. District Court after the Supreme Court of California denied petition for review of the Appellate Court's decision in favor of defendant. *Tsang v. Superior Court of San Francisco*, 1991 Cal. LEXIS 527. On March 10, 1995, the Court denied plaintiff's motion for a preliminary injunction enjoining the City's enforcement of the HCO and granted summary judgment to the City. C-91-4360- DLJ. The Court found plaintiff's facial challenge time-barred, as-applied challenge not ripe, and substantive due process claim insufficient on the merits.

In *Sparks v. City and County of San Francisco*, plaintiffs, owners of the Pacific Bay Inn, challenged the constitutionality of the replacement housing fee and attorneys fee requirements of the HCO under the Takings Clause of the Fifth Amendment and as violating their rights to procedural and

substantive due process. C 94-2398-DLJ. This case was filed in federal court after the plaintiffs were involved in two different state court actions regarding the HCO, where they unsuccessfully raised the unconstitutionality of the HCO as an affirmative defense. The City opposed the motion on the grounds that the statute of limitations had run, principles of res judicata, plaintiffs' as-applied challenges were not ripe, and the Ordinance reasonably relates to legitimate public purposes, thus passing constitutional muster. In May 1995, the Court approved a stipulated action by the parties that the case would be dismissed with prejudice.

Along with the cases in this Court, California state courts were also reviewing similar challenges to the HCO.[6] For example, in *Lambert v. City & County of San Francisco*, hotel owners challenged the City's denial of a conditional use permit under the HCO as an unlawful takings. *See Lambert v. City & County of San Francisco*, 57 Cal.App.4th 1172, 1177 (1997). The Superior Court held that the denial of the permit was not a takings, and granted summary judgment to the City. *Id.* The California Court of Appeals affirmed this result. It held that the HCO, as well as the denial of a conditional use permit, passed constitutional muster and did not effectuate a takings. *Id.* at 1180. When reaching its decision, the Court discussed how the applicable standard of review for the City's decision was not the strict scrutiny standard of review stated in *Nollan*[7] and *Dolan*[8], but a more deferential level of review.

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[6] Many of the decisions by the California courts are unpublished.

[7] *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987).

[8] *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Id. at 1181. The Supreme Court of California denied review. *Lambert v. City & County of San Francisco*, 981 P.2d 41 (Cal. 1999), *cert denied, Lambert v. City & County of San Francisco*, 529 U.S. 1045 (2000).

With the related cases holding the HCO constitutional in the background, the Court continued to review San Remo's case. On August 26, 1996, the Court dissolved the preliminary injunction and granted summary judgment to the City. The Court held: (1) plaintiffs' facial takings claim was barred by the applicable one-year statute of limitations, and there was no basis for applying equitable tolling; (2) plaintiffs' as-applied takings claim was not ripe, and thus the Court lacked subject matter jurisdiction; (3) plaintiff's procedural and substantive due process claims were insufficient on the merits; (4) plaintiff'S pendant state law claims were insufficient on the merits; and (5) plaintiffs' request for leave to amend to add an equal protection claim was denied as futile, because their state law action for mandamus review was still pending.

On appeal, the United States Circuit Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. *San Remo v. City and County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998). The Circuit Court held that San Remo's as-applied takings claim was not ripe because an inverse condemnation action had not been pursued in state court. *Id.* at 1102 (citing *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)). The Court then invoked *Pullman*[9] abstention with

[9] Pullman abstention is an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions. *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095,1104 (9th Cir. 1998). Pullman abstention is-appropriate when: (1) the federal plaintiff's complaint requires resolution of a sensitive question of federal constitutional law; (2) the constitutional question could be mooted or narrowed by a definitive ruling on the state law issues; and (3) the possibly determinative issue of state law is unclear. *Id.* Once Pullman abstention is invoked by a federal court, the federal plaintiff must then seek a definitive ruling in the state courts on the state law questions before returning to federal court. *Id.*

regard to San Remo's facial takings challenge, staying further proceedings pending San Remo's litigation of their state claims. *Id.* at 1105. San Remo then amended their state court petition for writ of administrative mandate to add facial and as-applied takings claims.

In state court, plaintiffs challenged the administrative determination that they needed a conditional use permit by a petition for writ of administrative mandate. They also challenged the $567,000 fee by paying it under protest and asserting a refund claim under the Mitigation Fee Act. *California Government Code §§ 66000 et seq.* Plaintiffs alleged that the City's legislative enactments and administrative actions that resulted in the $567,000 fee was a takings without just compensation. They alleged both a facial and as-applied challenge to the HCO and all of the City's legislative enactments and administrative actions that resulted in the imposition of the $567,000 fee.

Plaintiffs' state court complaint presented their state law claims, but they explicitly reserved their right to litigate their federal claims in federal court by filing an *England*

reservation.[10] *England v Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

The San Francisco Superior Court sustained the City's demurrer to the takings claims and denied the petition for a writ of mandate. The California Court of Appeal reversed. The California Supreme Court granted review.

On March 4, 2002, the California Supreme Court issued its decision in favor of the City on all issues *San Remo v. City and County of San Francisco* ("San Remo II"), 27 Cal.4th 643 (2002).

The California Supreme Court held that the plaintiffs' writ petition was properly denied because the San Remo had not been in 100% tourist use (i.e., there had been some residential use) when the zoning changed. *San Remo II*, 27 Cal.4th at 663. The California Supreme Court also affirmed the trial court's decision to sustain the City's demurrer to the plaintiffs' takings claims. The Court held that the HCO was not constitutionally invalid, either on its face or as applied.

On June 4, 2002, San Remo filed their Amended Complaint in this Court. It seeks to litigate their federal takings claims. More specifically, they request: (1) a judicial declaration by this Court that the replacement housing provisions of the HCO and the conditional use authorization

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[10] When a federal court abstains from a case and compels a litigant to submit this entire case to state court, the litigant is not compelled to litigate his federal claims in state court. Through an *England* reservation, a party can preserve his right under the abstention doctrine to return to District Court by informing the state courts that he so intends, should the state courts hold against him on the question of state law. *England*, 375 U.S. at 420.

requirements of the zoning Ordinance, separately and in concert with each other, whether facially or as-applied to plaintiffs, violate their rights to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution and that those provisions be declared invalid and unenforceable; (2) an award of damages in the sum of $567,000 plus interest; (3) an award of costs and attorneys fees as permitted by law; and (4) further relief as the Court deems just and proper.

B. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a district Court must dismiss a complaint if it fails to state a claim upon which relief can be granted. When deciding a Rule 12(b)(6) motion to dismiss, the Court must take all allegations of material fact as true and construe them, and all reasonable inferences therefrom, in the light most favorable to the nonmoving party. *See Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998); *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). The complaint should not be dismissed unless the complainant can prove no set of facts in support of his claim that would entitle him to relief. *Symington*, 51 F.3d at 1484. Even if the face of the pleadings suggests that the chance of recovery is remote, the Court must allow plaintiffs to develop the case at this stage of the proceedings, *United States v City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981).

If the Court chooses to dismiss the complaint, it must then decide whether to grant leave to amend. In general, leave to amend is only denied if it is clear that amendment would be futile and "that the deficiencies of the complaint could not be cured by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448

(9th Cir. 1987)(quoting *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (per curium)).

When the complainant has attached various exhibits to the complaint, those exhibits may be considered in determining whether dismissal is proper without converting the motion to one for summary judgment. *Id.* (citing *Cooper v. Bell*, 628 F.2d 1208, 1210 n. 10 (9th Cir. 1980).

II. DISCUSSION

The Court analyzes plaintiffs' takings allegations as four distinct claims; Plaintiffs are alleging both facial and as-applied takings claims to both the HCO and the Planning Code. As conceded by plaintiffs at oral argument, plaintiffs due process claims have been resolved and are not before the Court at this time.

The City argues that the Court should dismiss San Remo's Amended Complaint for failure to state a claim upon which relief can be granted for four reasons. One, the City argues that San Remo's allegations concerning the constitutionality of the conditional use permit are solely questions of state law and should not be heard by this Court. Two, the City argues the actions are time-barred. Three, the City argues even if the takings claims are not time-barred, they must be dismissed under the doctrine of issue preclusion. Finally, the City argues that even if the Court were to consider the takings claims on the merits, they must be dismissed because the Takings Clause is not applicable to an obligation to pay money and, even if it were, the payment of a mitigation fee would not constitute a takings under any applicable test. Each argument will be addressed in turn.

A. The Planning Code and Conditional Use Permit

The conditional use permit approved by the City pursuant to the Planning Code required plaintiffs to pay the City $567,000, as required by the 1990 HCO. In their Amended Complaint, San Remo pleads that this condition constitutes a takings.

The City argues that whether San Remo needs a conditional use permit under the City's Planning Code to convert to a permanent hotel is an issue of state law, and so all references to the Planning Code and the conditional use permit should be ignored. It argues that San Remo's only federal claim in this action is a takings challenge to the HCO.

The City supports its position by arguing that the fee at issue in the case arises from the HCO and not the Planning Code or the conditional use permit. It argues San Remo would have been assessed an HCO fee for conversion regardless of the Planning Commission's action on the conditional use permit. It claims that when granting the conditional use permit, the Planning Commission merely acknowledged the HCO fee. It points to language in the California Supreme Court decision to support its position, where the Court stated: "In their application for a conditional use permit, plaintiffs, who had already applied for a conversion permit under the HCO, assured the Planning Commission that they would comply with the HCO. The Commission incorporated that assurance as a condition of the permit, but did not itself assess any fee." *San Remo II*, 27 Cal.4th at 663.

The Court rejects the City's arguments and finds that both the facial and as-applied federal takings claims with respect to the Planning Code and the conditional use permit must be

considered by the Court. The conditional use permit, issued pursuant to the Planning Code, by its own terms required the payment of $567,000. The fact that the City based this condition on the requirements of the HCO, or that San Remo would have to pay the fee regardless of this condition to the use permit, does not change the fact that San Remo could not get a conditional use permit unless it paid the City $567,000.

B. Statute of Limitations

The City argues that San Remo's facial and as-applied takings challenge based on both the HCO and Planning Code are barred by the applicable statute of limitations.

The United States Supreme Court has generally eschewed any "set formula" for determining whether a takings has occurred. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). Instead, to determine whether a government regulation of property works a taking of property under the Fifth Amendment to the United States Constitution, the Court engages in "essentially ad hoc, factual inquiries," balancing the public and private interests at stake. *Id.; Penn Central Transportation Co. v. NewYork City*, 438 U.S. 104, 124 (1978). In engaging in this essentially ad hoc, factual inquiry, the Supreme Court identified in *Penn Central* several factors that have particular significance, with three primary factors weighing in the balance: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Penn Central Transportation*, 438 U.S. at 124-27.

Despite this ad hoc inquiry, the Supreme Court has categorically held physical occupation of property is a "taking" requiring just compensation, regardless of the extent

of the physical invasion. *Lucas*, 505 U S. at 1015-1016 (1992); *Yee v. City of Escondido*, 112 S. Ct. 1522, 1528 (1992). Moreover, the Fifth Amendment is violated when a land-use regulation "does not substantially advance legitimate state interests," or denies an owner economically viable use of his land. *Id.* at 1532; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Penn Central*, 438 U.S. at 127, 138.

In order for a court to reach a takings claim on the merits, however, it must be brought within the applicable statute of limitations. Claims alleging an unjust taking must be brought pursuant to *42 U.S.C. § 1983*. The statute of limitations for a claim under *section 1983* in California is one year from the date of accrual. *Wilson v. Garcia*, 471 U.S. 261 (1985); *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1049 (1993) ("Azul II"); *Golden Gate Hotel Ass'n v. San Francisco*, 18 F.3d 1482 (9th Cir, 1994).[11]

1. Facial Challenge

The city argues that San Remo's facial takings claims are barred by the applicable statute of limitations. This argument was previously made and accepted by this Court in its Order dated August 26, 1996. As explained, infra, and consistently with its previous Order, the Court finds San Remo's facial challenges to both the HCO and the Planning Code are barred by the statute of limitations.

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[11] In *Golden Gate Hotel Ass'n v. City and County of San Francisco*, 18 F.3d 1482 (9th Cir. 1994), the Ninth Circuit vacated Judge Vukasin's decision and ruled that the one year statute of limitations applied to a challenge to the HCO.

a. The HCO

i. 1981 Ordinance

The Fifth Amendment proscribes the taking of property without just compensation. *Levald v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir. 1993) . Accordingly, as long as the state provides an adequate process for obtaining compensation, no constitutional violation can occur. *Id*. Thus, a plaintiff cannot bring a *section 1983* action in federal court until the state denies just compensation. *Id*.

In cases where it is futile to seek compensation in state court, "a facial challenge to a statute as a takings without just compensation under *section 1983* accrues upon the passage of the ordinance." *Id*. at 688. The unavailability of a state remedy is considered the functional equivalent of a denial of just compensation. *Id*. at 687. California did not recognize a remedy for regulatory takings until 1987. *Id*. at 689.

In this case, the City first enacted the HCO in 1981. Because California did not recognize a remedy for regulatory takings until 1987, any attempts to seek compensation in state court would be futile. *Id*. at 689. Accordingly, the statute of limitations began to run in 1981, when it was first enacted. Plaintiffs did not file their complaint until 1993, twelve years after the enactment of the statute. Thus, their facial claim is time-barred.

San Remo argues that the 1996 Order is erroneous. It argues that the *Levald* case[12], which this Court's decision

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[12] In *Levald*, the owner of mobile home park brought an action challenging Palm Desert's rent control and vacancy control ordinance as effecting a takings without just compensation. The Ninth Circuit held that the petitioner's facial takings claim was time-barred because it was brought over one year after the ordinance was enacted. The Court held that a facial challenge to a statute as a takings without just compensation under *section 1983* accrues upon the passage of the ordinance, if it would be futile to seek compensation in state court. As recognized by the petitioner, it would have been futile to seek compensation in state court because California law had not yet provided a remedy for regulatory takings.

rested upon, has recently been overruled by the Supreme Court in *Franconia Associates v. United States*, 122 S.Ct. 1993 (2002).

San Remo's analysis of *Franconia* is misplaced. In *Franconia*, the federal government entered into mortgage loan contracts with developers of affordable housing. The loan contracts required that housing projects using loan money remain affordable for the life of the loan. The loan contracts, however, allowed the developers to prepay the loans and, thus, remove the affordability restrictions. In 1988, the government enacted a new statute entitled the Emergency Low Income Housing Preservation Act of 1987 ("ELIHPA"). ELIHPA restricted the government's ability to "accept" prepayments as promised in the loan agreements.

The petitioners argued that the statute of limitations for challenging ELIHPA began to run when the statute was passed. Relying on contract law, the Supreme Court rejected this argument. Reversing the Federal Circuit, it found that a cause of action for breach of contract based on the prepayment clause of ELIHPA did not accrue until a borrower performed, that is, attempted and was prevented from making a prepayment as promised. *Id*. at 2002. Having reversed the Federal Circuit Court's decision on the basis of

contract law, the Court found that it "need not separately address petitioners' alternate theory of recovery based on the Takings Clause of the Fifth Amendment," and remandedthe case back to the lower court. *Id.* at 2004. Thus, the decision in *Franconia* left the holding in *Levald* unaffected.

ii. 1990 Ordinance

San Remo also argues that the statute of limitations does not bar their action because it is the 1990 HCO and not the 1981 Ordinance which fails to pass constitutional muster. As such, plaintiffs argue that the statute of limitations began to accrue either when the City imposed the $567,000 fee as a condition of the conditional use permit in 1993 or when the state courts rejected their claim on appeal.

Plaintiffs support this theory by arguing that "while the original Hotel Ordinance might have passed constitutional muster because it allowed unlimited use of residentially designated rooms during the summer months," the 1990 HCO goes "too far." *Opposition* p. 18. It argues that the new provisions in the 1990 HCO which increases the replacement housing fee, limits summer tourist use to 25% and requires "winter residential rentals to permit the summer tourist rentals" constitute such significant changes that it resulted in a facial takings. *Id.*

The Ninth Circuit recognizes that a subsequent modification of a statute may give rise to a new cause of action, thus restarting the clock for calculating the statute of limitations. *DeAnza Properties, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1086 (9th Cir. 1991). However, a re-enactment of a statute does not restart the clock in the takings context when the plaintiffs suffer virtually the same injury under a new amendment as under the prior law. *Id.*

In this case, the core arguments as to why the 1990 amendments are unconstitutional are equally applicable to the 1981 Ordinance. San Remo's arguments are that: (1) the $567,000 permit fee is a "ransom" that fails to substantially advance legitimate government interest because it: (a) requires the payment of the $567,000 permit fee; (b) forces plaintiffs to bear the public burden of housing the poor; (c) forces San Remo and a small group of other residential hotels to provide a general public benefit and (d) constitutes "extortion"; and (2) the HCO fails to substantially advance a legitimate state interest, and forces plaintiffs to bear the public burden of housing the poor, without just compensation.

As to San Remo's first and primary challenge based upon the $567,000 fee, they suffer the exact same injury under the 1990 Ordinance as under the 1981 Ordinance. The amount of the replacement housing fee that San Remo is required to pay is based on the 1981, and not the increased 1990 rates. San Remo was grand-fathered in under the 40% replacement housing fee requirements of the 1981 HCO. *San Remo II*, 27 Cal. 4th at 651 n.3.

San Remo's arguments based on the changes in summer tourist use are also unavailing. San Remo's injury under the 1990 Ordinance is not significantly different than under the 1981 version. While the 1990 Ordinance limited summer use, it did not do so in the unconditional manner alluded to by San Remo. Instead, as already described, it limits summer use to 25% unless an individual fails to satisfy certain criteria. *HCO* § 419(a); *San Remo II*, 27 Cal.4th at 651-52. Thus, on its face, the 1990 HCO did not substantially increase the injury

suffered by San Remo.[13]

Moreover, even if San Remo's facial challenge to the HCO did not accrue until 1990, their action, which was filed in 1993, is still untimely. For "substantially advances" takings claims, the denial of just compensation is irrelevant for purposes of ripeness. *San Remo v. City and County of San Francisco* (San Remo I), 145 F.3d 1095, 1102 (9th Cir. 1998). Therefore, San Remo's claim that the HCO does not substantially advance legitimate government interests was ripe and the one-year statute of limitations began to run in May 1990 when the statute was enacted three years before this action was filed.

b. Planning Code

The City adopted the NBNCD in 1987, six years before this action was filed. A facial challenge accrued at this time, and, for the reasons, discussed above, San Remo's facial challenge to the Planning Code is time-barred.

c. Equitable Tolling

San Remo argues that their facial challenges are not barred by the statute of limitations because the period was equitably tolled. This argument was made to this Court and rejected in its August 1996 order. As the Court ordered in 1996, equitable tolling rules do not apply. *See Order*, dated

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[13] Moreover, the City points out in its Opposition that San Remo applied for and received approval from the City for 100% summer tourist rentals under *HCO* § 419(a) for each year following the 1990 amendments until the San Remo was converted to a permanent tourist hotel in 1993.

August 26, 1996. As in 1996, San Remo is unable to allege any facts that the City was on notice of their constitutional claims, thus tolling the statute of limitations, before the limitations period had run.

Federal courts borrow equitable tolling rules from the forum state. *Cervantes v. San Diego*, 5 F.3d 1273 (9th Cir. 1993). Under California law, a plaintiff's pursuit of a remedy in another forum equitably tolls the limitations period if a plaintiff's action satisfy the following three-pronged test: (1) timely notice to the defendants in filing the first claim; (2) lack of prejudice to the defendants in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct in filing the second claim. *Cervantes*, 5 F.3d at 1275 (citing *Donoghue v. Orange Co.*, 848 F.2d 926, 931 (9th Cir. 1987)). The doctrine of equitable tolling "focuses on the effect of the prior claim in warning the defendants in the subsequent claim of the need to prepare a defense." *Id.* In California, application of the three-part test is "mandatory" in determining whether equitable tolling applies. *Id.* at 1275-76.

In this case, defendant claims that plaintiffs fail to satisfy the first prong of the California test. According to the City, plaintiffs' administrative filings were insufficient to provide it with the notice required by the equitable tolling doctrine because none of plaintiffs' administrative filings constituted challenges to the constitutionality of the HCO or the Planning Code.

The Court rejects the City's argument that it was not provided with proper notice during the administrative proceedings. California does not require that the actions brought by a plaintiff be identical in order to satisfy the notice requirement. *Retail Clerks Union Loc. 648 v. Hub Pharmacy*,

707 F.2d 1030, 1034 (1983), citing *Elkins v. Derby*, 12 Cal.3d 410 (1974) . " [A] defendant's interest in notice is to enable it to gather and preserve evidence. . . . When the notification purpose of a statute of limitations is satisfied, the court liberally applies tolling." *Id*. In August 1996, plaintiffs submitted briefs in the administrative proceedings which provided adequate notice of plaintiffs' constitutional challenge to the HCO.

However, although the briefs submitted by plaintiffs would appear sufficient to satisfy the notice requirement as of that time, plaintiffs' did not present evidence in1996, nor allege any facts which would support a showing that the City had notice of the arguments contained in these briefs prior to the running of the one year statute. As plaintiffs admitted, the first hearing on these issues was scheduled for August 20, 1992, over two years after the enactment of the 1990 HCO, and thus after the statute of limitations had expired. Without timely notice, equity does not permit the tolling of the limitations period during the pendency of plaintiffs' administrative appeals. Accordingly, the equitable tolling rules do not apply to plaintiffs' facial takings claims.

2. <u>As-applied Challenge</u>

In this Court's 1996 Order, it did not find that San Remo's as-applied takings claims were time-barred, but rather that the claims were unripe for adjudication in federal court. *Order* at 18. San Remo now argues that the HCO and conditional use authorization requirements of the Zoning Ordinance as-applied to them violate the Fifth Amendment.

The proper categorization of San Remo's claim as facial or as-applied is important, amongst other things, as each raises different ripeness and statute of limitations issues. *San Remo II*, 1998 F2d at 686.

A facial challenge to the constitutional validity of a statute considers the text of the legislation itself. In contrast, an as-applied challenge "contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right." *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1084 (1995).

In the context of a constitutional takings claim, a facial challenge involves "a claim that the mere enactment of a statute constitutes a takings," while an as-applied challenge involves "a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 494, (1987).

In order to assert an as-applied challenge, plaintiffs must allege that a particular ordinance is applied differently to their particular property than to other similarly situated property owners. For example, in *Travis v. County of Santa Cruz*, the petitioner argued that the County exceeded its authority by imposing certain occupancy restrictions, rent controls and deed restrictions as mandatory conditions upon granting development of specified property. 122 Cal. Rptr. 2d 713 (2002). The Court held that the petitioners failed to assert an as-applied takings challenge, despite their arguments to the contrary. *Id*. at 721. It reasoned that because the petitioners did not "clearly allege" that any of the imposed conditions

differed in anyway from conditions imposed on other applicants for permits, or that the Ordinance had a disparate fiscal effect on them as compared to other similarly situated proper owners, their claim was only facial. *Id.*; *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal.4th 952, 961, (1999).

Similarly, in *Levald*, the Ninth Circuit found that the plaintiffs failed to "clearly" allege an as-applied takings challenge. *Levald*, 998 F2d at 686. The Court reasoned that the payment required in the statute at issue, though the amount might vary amongst property owners, arose not based on a particular application of the statute, but solely from the existence of the statute itself. *Id.*

a. The HCO

The City argues that San Remo's "as-applied" claims regarding the HCO should be categorized as a facial, rather than as-applied, because San Remo is not challenging the amount of the fee imposed on their property, but rather the underlying policy of the HCO. *See Complaint* ¶¶ 51, 63, 64, 66, and 67.

The Court finds that San Remo's "as-applied" claims regarding the HCO should be categorized as a facial, and not an as-applied takings claim. San Remo is not challenging the amount of the fee imposed on their property, but rather the underlying policy of the HCO. *See Complaint* ¶¶ 51, 63, 64, 66, and 67.[14] It contends that the HCO in its entirety fails to

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[14] As the City argues, San Remo never filed an administrative appeal challenging the City's appraisal of 40% of the replacement costs of the converted units or has it pled or argued in any of the prior court proceeding that the fee exceeded the 40% replacement

substantially advance legitimate state interests. It does not allege an impermissible application of the Ordinance or that the City is imposing the statute in a manner different from similarly situated property owners.[15]

Moreover, as in *Levald*, it is the existence of the HCO and not a particular application that gives rise to the alleged takings. The HCO imposes the replacement housing requirement based on a formula. As the California Supreme Court found "The HCO is a generally applicable legislation that applies, without discretion or discrimination, to every residential hotel in the City. All proposals to convert residential tourist use are subject to the same ordinance." *San Remo II*, 27 Cal.4th at 669.

Thus, San Remo's claim should be categorized as facial, rather than an as-applied challenge. As such, it is barred under the statute of limitations as discussed above.

Even if San Remo were to plead an as-applied challenge, it would still be time-barred because it accrued in 1981 when the City enacted the HCO. The Supreme Court has stated that an "as-applied" takings challenge is ripe, thus starting the clock for the statute of limitations, when the entity charged with implementing the ordinance at issue arrived at a final

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cost.

[15] The most "specific" argument made by San Remo appears in their Opposition. They argue that even though more than 500 properties are subject to the HCO, fewer than 20 have ever paid a fee, and so they are being treated differently than other properties. The Amended Complaint, however, pleads only that they and a few other property owners are required to provide a general public benefit and does not plead differential treatment.

definitive position regarding how it will apply the regulations at issue to the particular land in question. *Greenbrier v. United States*, 193 F.3d 1348, 1359 (Fed. Cir. 199), *cert. denied*, 530 U.S. 1274 (2000); *Williamson*, 473 U.S. at 186.

As discussed by the California Supreme Court in *San Remo II*, 27 Cal.4th at 668-70, the HCO is a generally applicable statute.[16] It applies to every residential hotel in the City without discretion or discrimination. As such, the statute of limitations began to run in 1981 when the City applied the HCO to the San Remo. In 1981, following San Remo's response to the City's survey indicating that all the guests rooms in the hotel had been rented to long term residents on September 23, 1979, the City issued a Certificate of Use to San Remo confirming that all of its guest rooms were subject to the HCO. *San Remo II*, 27 Cal.4th at 653-54. This certificate was displayed in the hotel lobby; under the HCO, the City-issued certificate of use was required to be posted in the hotel lobby when issued in 1981. HCO § 41.6(d). As already described, plaintiffs assert they were unaware of the 1981 survey that established the hotel's initial status, and did not know the hotel's classification until 1983. Even if this Court used 1983, the year San Remo took possession of the hotel and became aware of the classification, as the applicable time for when their claim accrued, their action is still time-barred, as it was not filed until 1993.

There was no discretionary application by the City to San

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[16] According to the City, the ordinance applies to more than 500 properties containing (as stated in the 1990 HCO) more than 18,000 guest rooms. *HCO* § 41.3, subd. (d) . In *San Remo II*, plaintiffs accepted these numbers, but nonetheless, characterized the City as imposing housing preservation costs on on "a few" property owners. *San Remo II*, 27 Cal. 4th at fn. 12.

Remo after 1981, which would restart the limitations period. Thus, San Remo's as-applied challenge is time-barred.

b. The Planning Code

San Remo also asserts an as applied challenge to the Planning Code. In light of the discussion above as to as-applied claims, the Court finds that San Remo has not properly pled an as-applied challenge to the Planning Code.

However, it appears to the Court on the record thus far, that if an as-applied claim was properly asserted, the statute of limitations would not bar such a challenge. Arguably the last discretionary act of the City was in 1993 when the Board of Supervisors rejected San Remo's challenge to the conditions of the conditional use permit San Remo's first action in this Court was in 1993.

c. Equitable Tolling

For the same reasons stated above and in its 1996 Order, the Court finds that the equitable tolling rules are also inapplicable to San Remo's as-applied challenge to the HCO and Planning Code.

C. Issue Preclusion

The City argues that even if the takings claims are not time-barred, they must be dismissed under the doctrine of issue preclusion, which is known as collateral estoppel in California courts. The City concedes that San Remo's claims are not barred under the separate doctrine of claim preclusion because San Remo reserved their federal takings claims with an "*England* Reservation."

The preclusive effects of a former adjudication are collectively referred to by most commentators as the doctrine of "res judicata." *See* Restatement (Second) of Judgments, Introductory Note before ch. 3 (1982); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4402 (1981). Res judicata is often analyzed further to consist of two preclusion concepts "issue preclusion" and "claim preclusion." *Migra v. Warren City School Dist. Bd. of Educ*, 465 U.S. 75, 77 n. 1 (1984). "Claim preclusion" refers to the preclusive effect of a judgment in foreclosing relitigation of claims that were raised or should have been raised in earlier litigation. *Id.* "Issue preclusion" refers to the preclusive effect of a judgment in foreclosing relitigation of issues that have been actually and necessarily decided in earlier litigation. *Id.*

Under the doctrine of claims preclusion, "[A] valid final adjudication of a claim precludes a second action on that claim or any part of it." *Baker ex rel. Thomas v. General Motors Corp.*, 522 U.S. 222, 233 n. 5 (1998).

Under the doctrine of issue preclusion, a valid and final determination, in one proceeding of a necessary factual or legal issue may not be re-litigated in a subsequent proceeding involving a party to the prior action. *See Dodd v. Hood River County* ("Dodd II"), 136 F3d 1219, 1224 (9th Cir. 1998).

Pursuant to the Full Faith and Credit Act, *28 U.S.C. § 1738*, federal courts must "give a state court judgment the same preclusive effect as would be given to that judgment under the law of the state in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Therefore, California law on issue preclusion dictates our analysis. *Dodd II*,136 F.3d at 1225.

1. California Law

California Courts apply the doctrine of collateral estoppel to attempts to re-litigate the same issue in a later action. *Griset v. Fair Political Practices Com.*, 25 Cal.4th 688, 701-02 (2001). Collateral estoppel bars re-litigation of an issue decided at a previous proceeding if: (1) the issue decided in the prior case is identical with the one now presented; (2) there was a final judgment on the merits in the prior case; and, (3) the party to be estopped was a party to the prior adjudication. *Stolz v. Bank of America*, 15 Cal.App.4th 127; 222 (1993). Accordingly, if the substantive laws of takings in California and federal courts are coextensive, issue preclusion applies to any takings issues that were decided in California state courts that are later brought in federal court. *Dodd v. Hood River County* ("Dodd I"), 59 F.3d 852, 861 (9th Cir. 1995).

Under the takings clause of the California Constitution (art. I, § 19), "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into Court for, the owner." The federal takings clause (U.S. Const., 5th Amend.) provides: "nor shall private property be taken for public use without just compensation." Aside from protecting "a somewhat broader range of property values" than the corresponding federal provision, California construes both the federal and state clauses congruently. *San Remo II*, 27 Cal.4th at 664; *Hensler v. City of Glendale*, 8 Cal.4th 1, 9, fn. 4 (1994). Thus, because the substantive laws of takings in California and federal courts are coextensive, collateral estoppel applies through the doctrine of issue preclusion when the three-part California test is met.

In this case, San Remo alleges a takings based on two theories: (1) the replacement housing provisions of the HCO and the conditional use authorization requirements of the Zoning Ordinance Planning Code fail to substantially advance legitimate state interests, Complaint ¶¶ 51, 63-66; and (2) the replacement housing provisions of the HCO and the conditional use authorization requirements of the Zoning Ordinance Planning Code fails the *Penn Central* multi-factor test. These issues, with respect to the HCO, are precisely the same issues decided by the California Supreme Court based on federal law, thus satisfying the first prong of the three-part California test for issue preclusion. In state court, plaintiffs challenged the housing replacement requirement, alleging a takings of private property without just compensation.[17] The Court held that the HCO was not unconstitutional, either on its face or as-applied. *San Remo II*, 27 Cal.4th at 664-65, 676-79.

When reaching the final judgment on the merits, the California Supreme Court based its decision on both state and federal law. As stated by the California Supreme Court, "despite plaintiffs' having sought relief in this Court only for a violation of article I, section 19 of the California Constitution," the Court analyzed "their takings claim under the relevant decisions of both this Court and the United States

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[17] In state court, plaintiffs also challenged the conditional use permit requirement by way of a petition for a writ of administrative mandate. The California Supreme Court held that the trial court properly denied plaintiffs' petition for a writ of administrative mandate challenging the conditional use permit. *San Remo II*, 27 Cal.4th at658.

Supreme Court."[18] Consistent with this statement, throughout the decision, the California Court made repeated references and analyzed plaintiffs' claims based on Supreme Court takings case law. *See, e.g., San Remo II*, 27 Cal.4th at 664-71 (analyzing San Remo's claim under the *Penn Central* multi-factor test, and assessing whether the heightened *Nollan/Dolan* level of review applies). It then concluded, based on both federal and state takings law, that the HCO is not unconstitutional on its face or as-applied under either the California or United States Constitution. *Id.* at 676-77. More specifically, the Court recognized how "federal and state takings clauses, to be sure, place a limit, imprecise as it may be, on the regulatory burdens an individual property owner may be made to bear for public purposes." *San Remo II* , 27 Cal. 4th at 672-680, *citing Agins v. Tiburon*, 447 U.S. 255 (1980); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. at p. 491 & fn. 21; *Penn Central*, 438 U.S. at 124. However, after an analysis of federal law, the Court found that the housing replacement fee of the HCO bears a reasonable relationship to the loss of housing in San Francisco. *Id.*

The Court also rejected San Remo's as-applied challenge to the HCO. The Court reasoned that plaintiffs did not allege that the San Remo Hotel was, in 1979 or at any time, entirely in tourist use, as would be required to support their claim that the housing replacement fee has "no connection at all" to the hotel's historical use. As such, the Court rejected plaintiffs' argument that the amount of the fee paid by plaintiffs bore no

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[18] The California Supreme Court analyzed San Remo's claims under applicable federal law despite footnote 1 in its decision, where it includes language that suggests otherwise.

reasonable relationship to the impacts of their proposed conversion to tourist use. *Id.* at 678.

This final judgment decided issues identical to those raised by San Remo in its facial takings challenge to the HCO. Moreover, the Court decided San Remo's as-applied takings challenges to th HCO. Thus, if San Remo had properly alleged an as-applied takings claim to the HCO, it too would likely satisfy the first prong of the California test.

As to the second prong, the California Supreme Court decision was a final judgment on the merits. As discussed below, California courts consider a decision on a demurrer, as one on the merits, and consistently apply the doctrine of collateral estoppel. *See e.g., Briggs v. Lawrence*, 230 C.A.3d 605, 611 (1991); *Barker v. Hill*, 191 C.A. 3d 221 (1987).

Finally, as to the third prong of the California test for issue preclusion, San Remo was a party to the prior action.

Thus, the California Supreme court final judgment on the merits decided the identical issue now pled in the Amended Complaint with respect to the HCO. Accordingly, collateral estoppel applies to plaintiffs' facial challenge to the HCO; based on collateral estoppel, the Court would not have jurisdiction to address the challenge had it not been barred by the statute of limitations. Moreover, the California Supreme Court decided that the HCO was not unconstitutional as-applied to plaintiffs. As such, if plaintiffs properly alleged an as-applied claim, and it had not been barred by the statute of limitations, the decision would likely create collateral estoppel through the doctrine of issue preclusion also.

2. Level of Review

San Remo and the PLF argue that this court should not apply the doctrine of issue preclusion because the California Supreme Court applied an extremely deferential "rational basis" level of review instead of the "required" heightened *Nollan* and *Dolan* standard. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

Even if this Court were free to disregard the findings of the California Supreme Court, the Court finds that the heightened *Nollan* and *Dolan* standards do not apply to this case. This ruling is consistent with the 1996 Order of this Court, where it also ruled that a heightened level of review does not apply.

In *Nollan*, the Supreme Court was presented with a case where the California Coastal Commission required, as a condition to approval of a rebuilding permit, that owners provide the public an easement to pass across a portion of their property. After recognizing how a land use regulation does not effect a takings if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land, the Court found that the Commissioner's condition did not meet "even the most untailored" standard of means-end scrutiny, and thus required the payment of just compensation. *Nollan*, 483 U.S. at 834, 838, *citing Agins v. City of Tiburon*, 447 U.S. 255 (1980). While the Court did not elucidate with any precision the required means-end fit, it did caution that judicial scrutiny would be searching when "the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the

stated police-power objective." *Id.* at 841. Despite the fact that the standard articulated in *Nollan* was not explicitly conditioned on the taking of a possessory land interest, after *Nollan*, the Ninth Circuit decided in *Commercial Builders* that the correct standard for analyzing a regulation which does not exact a possessory land interest is the more permissive rational relationship test found in its earlier decision, *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983). *Commercial Builders*, 941 F.2d 872, 874 (9th Cir. 1991).

In *Commercial Builders*, appellants challenged an Ordinance by the City of Sacramento to help expand available low income housing. The Ordinance conditioned certain types of nonresidential building permits upon the payment of a fee intended to offset the burdens on the city caused by low-income workers who moved there to fill jobs created by the project in question. The Ninth Circuit held that the Ordinance in question did not work an unconstitutional takings because it was reasonably related to its stated purpose. *Id.* at 874-875. The Court rejected appellants argument that *Nollan* imposes a more stringent level of review for ordinances that place conditions on development; it further rejected the argument that the Ordinance must substantially advance its stated purpose. *Id.* In reaching its decision, the Ninth Circuit noted how none of the Circuits that considered the constitutionality of ordinances placing burdens on land use after *Nollan* interpreted the case as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land. *Id.* citing *St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 357 n. 6 (2d Cir.1990), *cert denied sub nom. Committee to Oppose Sale of St. Bartholomew's Church v. Rector*, 499 U S. 905 (1991); *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732, 737 (5th Cir. 1988); *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 178 (4th Cir. 1988). The

Court also rejected appellant's argument that the fee represented a transfer of property, and therefore more closely resembled a physical taking of property. The Court reasoned "Under appellants' theory, however, compensation would be required for every fee; therefore, every fee would be unconstitutional. We see no valid basis for such a rule." *Id.* at 875. The Supreme Court's more recent decision, *Dolan v. City of Tigard*, 114 S.Ct. 2309, 2316 (1994), does not undercut the explicit distinction drawn by the Ninth Circuit in *Commercial Builders*. Thus, Ninth Circuit precedent imposes a deferential level of review for ordinances that do not involve a physical taking.

In *Dolan*, the Supreme Court was presented with a situation similar to that in *Nollan*, where a government agency conditioned a development permit on dedication of a portion of the applicant's land. As such, the court elaborated on the question it had reserved in *Nollan*, namely the "required degree of connection between the exactions and the projected impact of the proposed development." *Dolan*, 512 U.S. at 386. It discussed that while no "precise mathematical calculation is required," a standard of "rough proportionality best encapsulates what we hold to be the requirement of the Fifth Amendment" *Id.* at 391. However, when elaborating and applying this "heightened scrutiny," the Court distinguished both the *Dolan* and *Nollan* cases from "other land use cases that involve essentially legislative determinations classifying entire areas of the city" or when "conditions imposed are simply a limitation on the use petitioner might make of her own parcel," where a more deferential standard is utilized. *Id.* at 385. It noted how, when evaluating generally applicable zoning regulations, "the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property

rights." *Id.* at 391 in. 8, *citing Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

In this case, as discussed by the California Supreme Court, the HCO does not provide City staff or administrative bodies with discretion as to the imposition or size of the housing replacement fee, and it applies the Ordinance without discretion or discrimination to every residential hotel in the city. *San Remo II*, 27 Cal.4th at 668. The City did not require dedication of any of San Remo's property as in *Nollan* or *Dolan*, nor did it require compliance with the statute in an arbitrary manner. As such, the heightened *Nollan* and *Dolan* standard do not apply in this case. The California Supreme Court utilized an appropriate level of scrutiny.

3. California Application of Issue Preclusion

San Remo argues, that California courts would not apply collateral estoppel in this case for four reasons.

First, San Remo argues that collateral estoppel should not apply because California courts only apply the doctrine to factual and not legal issues. It thus contends that because the California Supreme Court sustained a demurrer, where it could not make factual findings, its ruling does not preclude a later action based on the same factual allegations.

The Court rejects San Remo's argument. California courts have consistently applied collateral estoppel to questions of law. *See, e.g., Rutherford v. State of California*, 233 Cal. Rptr. 781 (1987); *United States Fire Insurance Company v. Hans F. Johansen*, 270 Cal.App.2d 824 (1969); *Pacific Maritime Assn. v. California Unemp. Ins. Appeals Board*, 236 Cal.App.2d 325, 334 (1965). When a question of law essential to a judgment is actually litigated and determined by

a valid and final judgement, it is conclusive on a later action that arises out of the same subject matter or transaction, unless injustice would result. *Johansen*, 270 Cal.App.2d at 834-35.

In this case, San Remo does not argue, nor would there be, any injustice from applying issue preclusion. The issues of law decided by the state Supreme Court arise out of the exact same transaction at issue in this case. Thus, the doctrine of issue preclusion applies to this case.

Second, San Remo argues that California courts give only limited effect in subsequent proceedings to a ruling on a demurrer.

The Court rejects this argument. In California, collateral estoppel applies when an issue is actually litigated and determined on a motion to dismiss for failure to state a claim, a motion for a directed verdict, or their equivalents. *Barker v. Hill*, 191 C.A.3d 221 (1987). Courts do not make a distinction when applying the doctrine based on the form of the ruling. In fact, it is not even necessary that an "exhaustive adversarial hearing" is conducted in order to preclude re-litigation. *Briggs v. Lawrence*, 230 C.A.3d 605, 611 (1991).

Third, San Remo argues that their federal takings claim is not barred because they are asserting "a different-albeit closely related-cause of action."

The Court also rejects this argument. California courts will not apply collateral estoppel if the second action concerns new facts or circumstances. *Oro Fino Old Mining Corp. v. El Dorado*, 225 C.A 3d 872, 878. However, the Courts consistently apply it for issues raised, even when some factual matters or legal arguments which could have been presented

were not. *Id*. This is true even if the unraised arguments or facts would have produced an opposite result if they had been raised. *Mattz v. Superior Court*, 250 Cal.Rptr. 278 (1988).

In this case, San Remo is arguing a violation of the Takings Clause based on the exact same facts and circumstances argued before the state courts. San Remo has not alleged any new changes since the California Supreme Court decision on March 4, 2002 At most, San Remo is arguing additional facts and arguments that it failed to argue before the state court. Yet, even if this is the case, collateral estoppel still applies.

Finally, San Remo contends that the "interpretation of a written document- without considering any extrinsic evidence" in a first action is not given preclusive effect in a second action, citing *Johansen*, 270 Cal.App.2d 824 (1969). However, the *Johansen* case does not stand for such a proposition. In *Johansen*, the Court invoked the exception to collateral estoppel because, based on the individual circumstances of the case, application of the doctrine would result in "grave injustice." *Id.* at 834. Neither it, nor other California court decisions, invoke the rule urged by San Remo.

4. England Reservation

San Remo and PLF argue that collateral estoppel does not apply because: (1) the Ninth Circuit ordered this Court to abstain under *Pullman*; and (2) San Remo invoked *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) in reserving their federal claims for federal court.

The Ninth Circuit held in *Dodd II* that a previous *England* reservation of a federal takings claims does not prevent

operation of the issue preclusion doctrine. 136 F.3d 1219 (1998). In *Dodd II*, Dodd filed a suit under *section 1983* in federal court alleging a takings in violation of the Fifth and Fourteenth Amendments. The District Court dismissed the claim as unripe. The Dodds appealed. However, because the Oregon Supreme Court decided the case during the pendency of the appeal, the Ninth Circuit determined that the federal issue was ripe and remanded. When arguing before the Oregon state courts, the Dodds explicitly asked the Oregon courts to refrain from addressing the takings issue under federal law by making an *England* reservation. On remand, the District Court determined that, despite the Dodd's *England* reservation, their federal claims were barred under the doctrine of issue preclusion.

The Ninth Circuit upheld this result. The Ninth Circuit stated "Nor does the Dodd's previous reservation of this federal takings claim under the doctrine of *England* prevent operation of the issue preclusion doctrine." *Id*. at 1227. The Court found that, "to the extent a party fully litigates a necessary issue in the course of a state proceeding that is identical to an issue before the federal court, they are precluded from taking a second bite of the apple." *Id*. The Court did note, however, that a party can effectively reserve claims for federal court under the *England* doctrine. *Id*. at 1227.

In *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992), homeowners brought a civil rights action against the Tampa airport based on claim that flights over their property constituted a takings. The homeowners filed suit in Manatee County Circuit Curt raising only state claims. After losing in state court, the homeowners filed suit in federal court under federal law. The district court dismissed the suit on res judicata principles. The Eleventh

Circuit upheld this result. In doing so, the Eleventh Circuit recognized the jurisdictional problem created by the interplay of *28 U.S.C. 1738*[19] and the Supreme Court's holding in *Williamson County*[20]. On the one hand, *Williamson County* requires potential federal court plaintiffs to pursue any available state court remedy that might lead to just compensation. On the other hand, if a litigant brings a takings claim under the relevant state procedure, he runs the risk of being barred from returning to federal court. *Id.* at 1301. The Court also recognized that the Supreme Court has not made a definitive ruling on the interplay of this case law. *Id.*; *Allen v. McCurry*, 449 U.S. 90, 101, 103-04 (1980).

The Eleventh Circuit resolved the dilemma by finding that a litigant involuntarily in state court, such as under *Williamson County*, can avoid issue preclusion through a *Jennings* reservation.[21] *Jennings v Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir. 1976). However, when coming to

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[19] Pursuant to *28 U.S.C. 1738*, "... Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

[20] In *Williamson County*, the Supreme Court held that a takings claim is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. *Williamson County*, 473 U S. at 186.

[21] A *Jennings* reservation allows a plaintiff in state court to reserve the right to bring federal claims in federal court should the state court find adversely to plaintiffs. A *Jennings* reservation is not at issue in this case.

this conclusion, the Court noted how it questioned the continued validity of *Jennings*, but was reluctant to overrule the case because it was "too late in the day" to do so. *Id.* It also stated how "If a *Jennings*-type reservation is not available in *section 1983* actions raising takings claims, 'plaintiffs could never obtain a hearing on their federal constitutional claims in federal court.'" *Id.* at 1307, quoting *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291, 298 n. 1 (5th Cir. 1979).

San Remo argues that the *Dodd I* and *Fields* cases are inapplicable, though both involved and discussed an *England* reservation, because neither involved *Pullman* abstention. The Court rejects this argument and find that both apply and support application of issue preclusion in this case. Neither decision is dependent on the fact that there was no *Pullman* abstention. Instead, both stress how litigants in state court, even if they are there involuntarily and invoke an *England* reservation, could be barred from later litigation in federal court by the doctrine of issue preclusion.

In addition to the reasoning of the *Dodd II* case, the City argues that issue preclusion should apply because San Remo voluntarily litigated their claims in state courts.[22] It argues that

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[22] San Remo argues that a plaintiff should not be required "without his consent and through no fault of his own, to accept instead a state's court's determination of [its federal] claims." However, in the Ninth Circuit case, it was plaintiffs who urged the Court to apply *Pullman* abstention. As stated in the Ninth Circuit decision: "Ironically, it is Field who urge us to abstain under *Pullman*. Normally, of course, *Pullman* abstention is invoked by the defendant, not only because it is the plaintiffs who initially chose the federal forum (and thus presumably wants it), but because *Pullman* abstention tends to delay resolution of the plaintiff's

the whole rationale for an *England* reservation and San Remo's argument as to why issue preclusion should not apply is inapplicable in ths case based on San Remo's voluntary decision to litigate in state court. As such, it argues that the failure of this Court to apply the doctrine would lead to the type of forum shopping that issue preclusion is designed to prevent.

The Court agrees with the City that San Remo voluntarily litigated its claims in state court. As discussed in the case before the Ninth Circuit, it was plaintiffs who urged the court to abstain under *Pullman*. *See San Remo I*, 145 F.3d at 1104-05. For this reason, as well as the reasoning discussed above, plaintiffs should be precluded from re-litigating their claims in federal court.

D. San Remo's Claim on the Merits

The City argues that even if the court were to consider the takings claim on the merits, it must be dismissed because the Takings Clause is not applicable to an obligation to pay money and, even if it were, the payment of a mitigation fee would not constitute a takings under any applicable test. Because this motion is under 12(b)(6), the Court will not rule on the merits at this point.

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constitutional claims. Unsurprisingly, the City views Field's request for abstention as an outrageous act of chutzpah, and argues that Field should be stuck with the federal forum he chose. Although we have some sympathy for the City's position, we agree with Field that a plaintiffs may raise *Pullman* abstention just as a defendant may, and he may do so for the first time on appeal." *San Remo I*, 145 F.3d at 1104-05.

However, if this Court were to rule on the merits, the Court agrees with the underlying rulings in previous cases.

As discussed in the Court's 1996 Order, even under the more demanding "substantial advancement" standard, the HCO and Planning Code would survive constitutional scrutiny against a facial challenge. The City's interest in preserving affordable rental housing is a legitimate government interest. On its face, both the HCO and Planning Code substantially advances this interest; the HCO does so by requiring landowners renting residential units to pay a portion of the costs of replacement housing before converting their units to alternative uses, while the Planning Code does so by requiring owners seeking to convert a residential use to a tourist hotel to first secure a conditional use permit. *See* HCO §§ 41. 2, 41.3; *see also Harsh Investment Corp. v. City and County of San Francisco*, C-94-0629-DLJ (June 21, 1994) (finding that the HCO serves a legitimate governmental purpose); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 690 (9th Cir. 1993). Because, on its face, the HCO and Planning Code substantially advances a legitimate government interest, both meet the substantial advancement test.

The HCO and Planning Code also meets the second prong of the regulatory takings test, in that it does not deprive hotel owners of all economically beneficial use of their property. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 128-130 (1978). There is some discrepancy among the Courts and commentators as to what constitutes a prohibition of "all economically beneficial use" of property. Some circuits have found that courts can and should separately analyze each "stick[] in the bundle of rights that are commonly characterized as property," *Dolan v, City of Tigard*, 114 S.Ct. at 2316, to determine whether the

regulation at issue effects a takings of a given stick. *See Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1572 n.32 (Fed. Cir. 1994) (suggesting that the many variants of property rights should be analyzed separately for a regulatory takings just as is done for a physical takings), *cert. denied*, 115 S.Ct. 898 (1995). More commonly, however, courts applying this test adhere to the more traditional approach articulated in *Penn Central, supra*, 98 S.Ct. at 2662, where the Supreme Court emphasized that regulatory takings jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. *Id.* at 1248; *see also Concrete Pipe & Prods v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2290 (1993).

Considering plaintiffs' entire bundle of property rights, the HCO and Planning Code do not effect a destruction of all economically viable use of the San Remo hotel. The terms of the Ordinances leave residential hotel owners free to rent rooms to residential tenants or to apply to convert their buildings to commercial use, and there is simply no evidence before this Court that the replacement housing exaction fee deprives all subject property owners of the viable commercial use of their property. As such, this Court would not conclude that the HCO and Planning Code constitute a facial takings.

Finally, the HCO, even if considered in conjunction with the NBNCD, does not authorize a compelled physical invasion of hotel property. At least on the face of the two ordinances, there is nothing which requires plaintiffs to rent their residential units to tenants. *See HCO* §§ 41.19, 41.20(a). Moreover, as the California court determined in *Bullock*, California's Ellis Act, Cal. Govt. Code § 7060 et seq., protects a property owner's plan "to go out of the residential hotel business." 221 Cal. App. 3d at 1099. The plaintiff in

Bullock argued that the exaction fee required by San Francisco's HCO was a "ransom" which could not be applied to prevent an owner from going out of the residential hotel business. The court ruled that "[t]he Ellis Act does not permit [the City of San Francisco] to condition plaintiff's departure upon the payment of ransom." *Id.* at 1101. The court also noted, however, that "[t]he City retains an amplitude of powers, which are expressly recognized in the Ellis Act, that may be relevant insofar as the City may see fit 'to regulate the subsequent use of the property following its removal from the rental market.'" *Id.* at 1102 (internal citations omitted).] Where the "right to exclude" tenants is not taken from a landowner, no physical invasion of the landowner's property has occurred. *See Yee*, 112 S.Ct. at 1528. Thus, because the HCO and Planning Code merely regulates plaintiffs, use of their land, it does not effect a physical takings.

E. Pacific Legal Foundation's Additional Arguments

In addition to the arguments addressed above, PLF raises two additional arguments.

One, PLF argues that California Courts provide an inadequate forum, depart from the constitutional safeguards mandated by the Supreme Court, and are hostile to federal takings claims. The Ninth Circuit has rejected this argument. *See Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1403 (9th Cir. 1989), *overruled by Armendariz v. Penman*, 75 F.3d 1311 (9th Cir.1996), *rev'd on other grounds*. It was not "swayed by the alleged 'reluctance of the California State Court system to lend a sympathetic ear to private property owners in just compensation cases'." *Id.* Similarly, this Court rejects PLF's conclusory argument. California Courts consistently consider and analyze under appropriate federal standards cases arising under the Takings

Clause of the Fifth Amendment. *See e.g., San Remo II*, 27 Cal.4th at 664-71; *Bullock v. City and County of San Francisco*, 221 Cal.App.2d 1072, 1089 (1990); *Gilbert v. State of California*, 218 Cal App.3d 234, 253-254 (1990); *Leppo v. City of Petaluma*, 20 Cal.App.3d 711, 719, (1971).

Two, PLF argues that the California Supreme Court decision should not be given preclusive effect because the Court deemed it to have none. The PLF points to the footnote in the beginning of the case where the Court stated it did not decide any federal questions. However, as mentioned previously, the Court contradicted this footnote throughout the decision and clearly stated it was applying and deciding the case based on federal law throughout the decision and in its holding (See section (II) (C) (1) of this memorandum). Thus, PLF's argument is rejected.

III. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS defendants' motion to dismiss plaintiffs' Amended Complaint with leave to amend.

The Court finds that:

1. Both plaintiffs' facial and as-applied federal takings claims with respect to the Planning Code and the conditional use permit must be considered by the Court.

2. Plaintiffs' facial takings claim to the HCO is time-barred.

3. Plaintiffs' facial takings claim to the HCO is additionally barred under the doctrine of issue preclusion.

4. Plaintiffs' failed to properly allege an as-applied takings claim to the HCO, However if properly alleged, an as-applied takings challenge to the HCO is time-barred.

5. Plaintiffs' facial takings claim to the Planning Code is time-barred.

6. Plaintiffs' failed to properly allege an as-applied takings claim to the Planning Code. However, if properly alleged, an as-applied takings claim to the Planning Code is not time-barred.

7. Plaintiff is granted leave to amend to allege an as-applied takings claim to the Planning Code. Any amended complaint must be filed within 30 days of the date of this Order.

IT IS SO ORDERED

Dated: October 15 , 2002

/s/ _____
D. Lowell Jensen
United States District Judge

APPENDIX E

SUPREME COURT OF CALIFORNIA

No. S091757

[Filed March 4, 2002]

SAN REMO HOTEL L.P. et al.,
Plaintiffs, Cross-defendants and Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO et al.,
Defendants, Cross-complainants and Respondents.

On Appeal From
Superior Court of the City and County of San Franscisco
Super. Ct. No. 950166
Ina Levin Gyemant, William J. Cahill, and Raymond D. Williamson, Jr., Judges

Court of Appeals of California, First Appellate District,
Division Five. No. A083530

OPINION

WERDEGAR, J.

Plaintiffs, the owners and operators of the San Remo Hotel in San Francisco, sought approval from the City and County of San Francisco to rent all rooms in the San Remo Hotel to tourists or other daily renters, rather than to longer term residents. Plaintiffs eventually received approval but, in the process, were required to (1) comply with zoning laws by obtaining a conditional use permit for use of their property as a tourist hotel, and (2) help replace the residential units San Francisco claimed would be lost by the conversion, pursuant to the city's Residential Hotel Unit Conversion and Demolition Ordinance (S.F. Admin. Code, ch. 41) (hereafter the HCO), which plaintiffs elected to do by paying an in lieu fee into a governmental fund for the construction of low and moderate-income housing.

Plaintiffs challenged the conditional use permit requirement by petition for writ of administrative mandate (Code Civ. Proc., § 1094.5), pled as the first cause of action in their second amended complaint, and challenged the housing replacement requirement by four additional causes of action alleging the taking of private property without just compensation in violation of article I, section 19 of the California Constitution.[1] The trial court denied the writ petition and sustained a demurrer to the takings counts. The Court of Appeal reversed.

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[1] Plaintiffs sought no relief in state court for violation of the Fifth Amendment to the United States Constitution. They explicitly reserved their federal causes of action. As their petition for writ of mandate, as well, rests solely on state law, no federal question has been presented or decided in this case.

Based on the administrative record and the pleadings, and guided by established legal principles, we conclude the trial court properly denied the petition for writ of administrative mandate and sustained the demurrer as to the remaining causes of action. We will therefore reverse the judgment of the Court of Appeal insofar as the appellate court reversed the trial court's judgment for defendant City and County of San Francisco.

I. BACKGROUND

Plaintiffs are San Remo Hotel L.P., a limited partnership; its general partner, T & R Investment Corp.; and its limited partners, Thomas and Robert Field. Defendants are the City and County of San Francisco, and the various agencies and agents through which it acted (collectively the City, or San Francisco).

Because the proceedings below turned on the application and validity of two bodies of local San Francisco law, we first summarize those ordinances.

A. *The San Francisco Hotel Conversion Ordinance*

The HCO, codified in chapter 41 of the San Francisco Administrative Code, was first enacted in 1981 (S.F. Ord. No. 330-81) and was substantially revised in 1990 (S.F. Ord. No. 121-90).[2] Its purpose is to "benefit the general public by minimizing adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their

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[2] Unless otherwise specified, all references to the HCO are to the 1990 version of the ordinance.

conversion and demolition." (HCO, § 41.2.) Accompanying the ordinance are findings that the City suffers from a severe shortage of affordable rental housing; that many elderly, disabled and low-income persons reside in residential hotel units; that the number of such units had decreased by more than 6,000 between 1975 and 1979; that loss of such units had created a low-income housing "emergency" in San Francisco, making it in the public interest to regulate and provide remedies for unlawful conversion of residential hotel units; that the City had instituted a moratorium on residential hotel conversion effective November 21, 1979; and that because tourism is also essential to the City, the public interest also demands that some moderately priced tourist hotel rooms be available, especially during the summer tourist season. (HCO, § 41.3.)

Each hotel room's initial status for purposes of the HCO was determined by having the owner or operator of each hotel file an initial unit usage report stating the number of residential and tourist units in their hotel as of September 23, 1979. (HCO, § 41.6, subd. (b)(1).) The HCO defines a "Residential Unit" as a "guest room" that was occupied by a "permanent resident" on September 23, 1979, or that was designated residential under section 41.6's procedures for initial status determination. (HCO, § 41.4, subd. (q).) A "Tourist Unit" is defined as a guest room *not* occupied by a permanent resident on September 23, 1979, or a guest room certified as a tourist unit under section 41.6. (HCO, § 41.4, subd. (s).) A permanent resident is a person who occupies a guest room for at least 32 consecutive days. (*Id.*, subd. (n).)

The HCO makes it unlawful to eliminate a residential hotel unit without obtaining a conversion permit or to rent a residential unit for a term shorter than seven days. (HCO,

§ 41.20, subd. (a).) Violators are subject to civil penalties. (*Id.*, subd. (c).)

An application to convert residential units to tourist use must include, inter alia, "[a] statement regarding how one-for-one replacement of the units to be converted will be accomplished." (HCO, § 41.12, subd. (b)(9).) The applicant may satisfy the replacement requirement by constructing or bringing onto the market new residential units comparable to those converted (HCO, § 41.13, subd. (a)(1),(2)); constructing or rehabilitating certain other types of housing for low-income, disabled or elderly persons (*id.*, subd. (a)(3)); or paying to a public or nonprofit housing developer, or to the City's Residential Hotel Preservation Fund Account, an in lieu fee equal to the replacement site acquisition costs plus a set portion of the replacement construction costs (*id.*, subd. (a)(4),(5)).[3] The replacement costs are to be determined by the City's Department of Real Estate based on two independent appraisals. (HCO, § 41.13, subd. (a)(4), (5).)

The 1981 and 1990 versions of the HCO differ in their treatment of temporary tourist rentals of residential units. The 1981 ordinance allowed summer season rentals (May 1 to September 30) of vacant residential units without numerical restriction, with the proviso that the room "shall immediately revert to residential use on application of a prospective permanent resident," but contained no provision for winter tourist rentals. (1981 HCO, § 41.16, subd. (a)(3)(B).) The

[3] The 1990 revision raised the portion of construction costs to be paid by the applicant from 40 to 80 percent. (1981 HCO, § 41.10, subd. (a)(4); 1990 HCO, § 41.13, subd. (a)(4), (5).) Plaintiffs, however, apparently applied during a "window" period (1990 HCO, § 41.13, subd. (d)) qualifying them for the 40 percent rate.

1990 revision additionally restricted summer tourist rentals of residential units by, among other things, limiting such rentals, absent special permission from the City's Bureau of Building Inspection,[4] to 25 percent of a hotel's residential rooms. (HCO, § 41.19, subd. (a)(3).) The revision, however, also allowed a limited number of residential rooms to be rented to tourists during the winter months as well. (*Id.*, subd. (c).)

B. *The San Francisco Planning Code*

In 1987, San Francisco adopted article 7 of its Planning Code, a set of zoning regulations for "neighborhood commercial districts." (S.F. Planning Code, § 701, added by S.F. Ord. No. 69-87.) The San Remo Hotel is within the North Beach neighborhood commercial district (hereafter North Beach district), created in 1987. The North Beach district "functions as a neighborhood-serving marketplace, citywide specialty shopping, and dining district, and a tourist attraction, as well as an apartment and residential hotel zone." (S.F. Planning Code, § 722.1.) While most new commercial development is permitted on the first two stories of buildings, new housing development is encouraged above the second story and "[e]xisting residential units are protected by prohibitions of upper-story conversions and limitations on demolitions." (*Ibid.*)

Tourist hotels are a conditional use in the North Beach district. (S.F. Planning Code, § 722.55.) "Conditional uses are permitted in a Neighborhood Commercial District when

[4] The Bureau of Building Inspection is now known as the Department of Building Inspection. For clarity, we shall generally refer to the Department as the Bureau, the name operative at the time of most of the events related herein.

authorized by the Planning Commission . . . . Conditional uses are subject to the provisions set forth in Sections 178, 179, and 316 through 316.8 of this Code." (S.F. Planning Code, § 703.2, subd. (b)(1)(B).)

A "permitted conditional use," the zoning category into which plaintiffs, before the City's zoning administrator, claimed the San Remo Hotel's tourist rental fell, is defined generally in San Francisco Planning Code sections 178 and 179. Generally, a permitted conditional use is defined, inter alia, as "[a]ny use or feature which is classified as a conditional use in the district in which it is located and which lawfully existed either on the effective date of this Code, or on the effective date of any amendment imposing new conditional use requirements upon such use or feature." (S.F. Planning Code, § 178, subd. (a)(2).) As to neighborhood commercial districts, a permitted conditional use is "[a]ny use or feature in a Neighborhood Commercial District which lawfully existed on the effective date of Ordinance No. 69-87 which is classified as a conditional use by the enactment of Ordinance No. 69-87." (S.F. Planning Code, § 179, subd. (a)(2).)

A permitted conditional use may continue "in the form in which it lawfully existed" on the effective date of the new conditional use requirement. (S.F. Planning Code, § 178, subd. (b).) But a permitted conditional use "may not be significantly altered, enlarged, or intensified, except upon approval of a new conditional use application." (*Id.*, subd. (c).)

"Residential conversion," defined as the change in occupancy from residential to nonresidential use (S.F. Planning Code, § 790.84), is prohibited above the first floor in the North Beach district. (S.F. Planning Code, § 722.38.) The Planning Code's definition of residential conversion, however, "shall not apply to conversions of residential hotels, as defined and regulated in [the HCO]." (S.F. Planning Code, § 790.84.)

C. *Factual Background*

One of plaintiffs' causes of action, the petition for writ of administrative mandate, was decided on an administrative record, while the other counts were dismissed on demurrer. On review of the latter ruling we, like the trial court, may consider only the factual allegations of the complaint and matters subject to judicial notice (Code Civ. Proc., § 430.30, subd. (a)), and not the administrative record. We therefore summarize the factual background of the writ petition separately from that of the remaining counts.

1. *The Petition for Writ of Administrative Mandate*

By their petition, pled as the second amended complaint's first cause of action, plaintiffs sought to overturn the City's administrative determination that, under the San Francisco Planning Code, plaintiffs were required to obtain a conditional use permit in order to use all rooms in the San Remo Hotel for tourist rentals. Plaintiffs allege that the City's zoning administrator, in a decision affirmed by the City's Board of Permit Appeals,[5] should have classified the proposed tourist

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[5] The Board of Permit Appeals is now known as the Board of Appeals. For clarity, we shall continue to use the earlier name as it was the name operative at the time of most of the events related

use of the San Remo Hotel as a permitted conditional use under section 179, subdivision (a)(2) of the Planning Code. Plaintiffs prayed for a peremptory writ of mandate directing the City to "recognize and acknowledge" that tourist use of the San Remo Hotel "is a permitted conditional hotel use."

The administrative record shows the following:

> On September 25, 1981, Jean Iribarren, then operating the San Remo Hotel under a lease from plaintiffs Thomas and Robert Field, filed the initial unit usage report required under the HCO. He reported the San Remo Hotel had 61 units in residential use both as of September 23, 1979, and seven days prior to filing the report, and zero units in tourist use on the same dates. On November 18, 1981, the Bureau of Building Inspection issued Iribarren a certificate of use reflecting the same usage numbers. According to a 1992 declaration by plaintiffs Thomas and Robert Field, Iribarren filed the "incorrect" initial unit usage report without their knowledge. They first discovered the report in 1983 when they resumed operation of the hotel. They protested the residential use classification in 1987, but were told it could not be changed because the appeal period had passed.
>
> On September 9, 1992, the Zoning Administrator of the San Francisco Department of City Planning, responding to plaintiffs' request for a written ruling, determined that operation of the San Remo as a tourist hotel was not a permitted conditional use under section 179, subdivision (a)(2) of the San Francisco

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herein.

> Planning Code. The ruling observes that beginning in May 1982, the San Remo Hotel was included in interim zoning districts requiring conditional use permits for operation of tourist hotels. That requirement became permanent in April 1987 with the establishment of the North Beach district. Planning Code section 790.47 defines a residential hotel as a hotel containing one or more residential units, a term defined by reference to the HCO. Because under the HCO all 62 units in the San Remo Hotel were classified as residential, its zoning classification was also as a residential hotel (a type of "group housing" under the Planning Code).[6]

The zoning administrator considered, but rejected, plaintiffs' claim that because they rented vacant rooms in the San Remo Hotel to tourists during the summer (permitted under the HCO with some conditions), and in some cases in the winter as well (permitted with special approval under the 1990 HCO), they operated a tourist hotel. According to the administrator, "[s]uch temporary authorization for tourist uses does not constitute a change of use and therefore all of the units in the Hotel remain residential units." The zoning administrator further found that, according to annual unit usage reports submitted by the San Remo Hotel to the Bureau of Building Inspection, between 25 and 57 units in the hotel were in fact occupied by residents from 1982 to 1992. Even if only these units were considered residential, and the remaining units deemed to have been in tourist use when the

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[6] The administrative record does not explain the variance between the 61 rooms initially certified by the Bureau of Building Inspection in 1981 and the 62 rooms referred to by the zoning administrator in 1992. The parties appear to agree the hotel now contains 62 rooms.

conditional use permit requirement took effect, the administrator ruled, plaintiffs would still be required to obtain a conditional use permit to convert the hotel to complete tourist use, because under San Francisco Planning Code section 178, subdivision (c), a permitted conditional use may not be significantly altered, enlarged or intensified without new conditional use authorization.

Hotel tax returns also indicate mixed residential and tourist use. Of the $ 60,942 in gross rent the San Remo Hotel earned in the quarter ending December 31, 1988, $56,676 was rent for occupancy by permanent residents (not subject to the hotel tax). For the first quarter of 1989, $33,897 of the hotel's $ 57,563 gross rent was from residential rentals. Even in the summer, a significant portion of the hotel's rental revenue was residential: for the quarter ending September 30, 1989, gross rent was $121,117, of which $34,469 was earned from residential rentals. According to a May 1991 decision of the Bureau of Building Inspection hearing officer approving plaintiffs' request to rent more than 25 percent of their rooms to tourists in the 1991 summer season, plaintiffs had presented evidence that in May 1991, 30 San Remo Hotel guests had occupied their rooms "for periods ranging from two months to ten years." Nine more had rented for more than a week, but less than a month.

The Board of Permit Appeals upheld the zoning administrator's determination that a conditional use permit was required to change the San Remo Hotel's use to a tourist hotel.

2. *The Takings Causes of Action*

In their remaining causes of action, plaintiffs allege that the HCO, and the various actions of City agencies requiring plaintiffs to comply with that ordinance, constituted a taking in violation of the California Constitution. **(1)** In reviewing a dismissal following the trial court's sustaining of a demurrer, we take the properly pleaded material allegations of the complaint as true. (*ABC Internat. Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal. 4th 1247, 1253 [61 Cal. Rptr. 2d 112, 931 P.2d 290]; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal. 4th 962, 966-967 [9 Cal. Rptr. 2d 92, 831 P.2d 317].)

Plaintiffs allege the following as to the hotel's legal status and history. "From 1916 to the present, the guest rooms in the San Remo Hotel have been rented primarily to transient and tourist guests on a commercial basis." Fewer than 20 percent of the rooms are, or were on August 5, 1987 (the effective date of the neighborhood commercial district zoning ordinance), occupied as primary residences. When plaintiffs purchased the San Remo Hotel in 1970, it was zoned C-2 commercial, with no restrictions on its use as a tourist hotel. After plaintiffs spent more than $250,000 on repairs and renovations, the City issued them a permit of occupancy for a 62-room hotel. From 1970 on, the City issued plaintiffs a hotel license and collected hotel taxes on the transient rental of the San Remo Hotel's rooms.

After the 1990 revision of the HCO, which revised the 1981 ordinance to place additional significant restrictions on tourist rental of residential rooms, plaintiffs applied under the HCO to "convert" to tourist use all the San Remo Hotel's rooms designated residential. The City's Planning Department told them they also had to apply for a conditional use permit

for the conversion to be allowed under the zoning laws. The planning commission subsequently granted plaintiffs' application for a conditional use permit on three conditions: plaintiffs were to mitigate the loss of housing by complying with the HCO's housing-replacement provisions, offer current long-term residents lifetime leases, and obtain variances from floor-area ratio and parking requirements. Plaintiffs appealed the imposition of these conditions, but the City's Board of Supervisors upheld the planning commission's decision. Plaintiffs ultimately satisfied the conditions, paying a $567,000 in lieu fee assessed by the Department (formerly the Bureau) of Building Inspection, which thereafter issued a permit for full tourist use of the hotel.

The second amended complaint alleges a taking, in violation of the California Constitution, in the City Planning Commission's requirement that plaintiffs pay a housing-replacement fee as a condition of receiving a conditional use permit. Plaintiffs claim that imposition of the fee "fails to substantially advance a legitimate government interest" and that "[t]he amount of the fee imposed is not roughly proportional to the impact" of the proposed tourist use of the San Remo Hotel. They further allege that "the requirement that plaintiffs pay the City $567,000 to obtain an HCO permit to convert" constituted a taking of their property without just compensation, entitling them to a refund of the fee, and that the City's regulatory scheme as a whole and its application to the San Remo Hotel constituted a taking in violation of the California Constitution. The prayer is for damages of $567,000 plus interest from December 11, 1996 (apparently the date the fee was paid), and other damages according to proof.

D. *Decisions of the Trial Court and Court of Appeal*

The trial court sustained the City's demurrer to the second through fifth causes of action. Some causes of action were, the court held, barred by *Pfeiffer v. City of La Mesa* (1977) 69 Cal. App. 3d 74 [137 Cal. Rptr. 804], in which the appellate court held that an applicant's compliance with building permit conditions barred a later action for damages resulting from imposition of the conditions. The remaining causes of action challenging the constitutionality of the HCO failed, the court concluded, because the HCO, as a legislative regulation, was not subject to the heightened scrutiny outlined in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 [107 S. Ct. 3141, 97 L. Ed. 2d 677] (*Nollan*) and *Dolan v. City of Tigard* (1994) 512 U.S. 374 [114 S. Ct. 2309, 129 L. Ed. 2d 304] (*Dolan*).

Subsequently, after hearing argument directed to the writ petition, but without receiving evidence outside the administrative record, the trial court denied the requested writ of administrative mandate. Whether reviewed on the substantial evidence or independent judgment test, the court found, the Board of Permit Appeals' decision finding the San Remo Hotel was in residential use, thus requiring a conditional use permit for use as a tourist hotel, must be upheld. The trial court relied primarily on the City's 1981 issuance of a certificate of use designating all rooms in the hotel residential, concluding therefrom that "residential use of the San Remo was the only lawful use." Plaintiffs' temporary tourist rental of vacant rooms designated residential, as permitted under the HCO, the court held, did not effect a change of use under the zoning law.

Having denied the writ sought by the first cause of action and sustained a demurrer to the remaining counts without

leave to amend, the trial court entered judgment for the City on plaintiffs' complaint.[7]

The Court of Appeal reversed. The City's demurrer should have been overruled, the appellate court held, because plaintiffs pled facts showing that the HCO, as applied to require payment of the $567,000 conversion fee, effected a taking under the Fifth Amendment to the United States Constitution and article I, section 19 of the California Constitution. The claim of a taking in exaction of the in lieu fee was one to which "*Nollan/Dolan/Ehrlich*[8] heightened or intermediate scrutiny analysis" should apply, because "the monetary sum of $567,000 exacted by the City here is a fee, exaction or payment in a 'discretionary context' which presents 'an inherent and heightened risk that local government will manipulate the police power' in a manner which 'avoid[s] what would otherwise be an obligation to pay just compensation.' (*Ehrlich*, *supra*, 12 Cal. 4th at p. 869.)" The fee failed both the "essential nexus" and "rough proportionality" parts of that test, the Court of Appeal concluded, because it was based on the "fiction" of full residential use created by the 1981 survey and certificate of use.[9]

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[7] Judgment was also entered for the City on its cross-complaint for penalties under the HCO, but as no issue regarding the cross-complaint is before us on review, that action need not be described further.

[8] *Nollan*, *supra*, 483 U.S. 825; *Dolan*, *supra*, 512 U.S. 374; *Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854 [50 Cal. Rptr. 2d 242, 911 P.2d 429] (*Ehrlich*).

[9] The Court of Appeal held *Pfeiffer v. City of La Mesa*, *supra*, 69 Cal. App. 3d 74, upon which the trial court partially relied,

With regard to the writ petition, the Court of Appeal reversed and remanded for factual determinations. The trial court erred, the Court of Appeal held, in holding that the City's classification of all rooms in the San Remo Hotel as residential rendered any tourist use unlawful for purposes of zoning. "The City's local zoning laws applicable to hotels in the early 1980's made no distinction between the use permits for hotels based upon their 'residential' or 'tourist' status under the HCO. Thus, such Hotel rentals to tourists in the 1980's would have been legal, under the City's planning code then in effect. We therefore conclude that the Hotel could be an existing legal nonconforming use under the [North Beach district], notwithstanding the 1981 certificate of use." Because the trial court, believing prior tourist use would have been unlawful, had not determined its historical existence, the Court of Appeal remanded for further factual findings by the trial court or administrative agency concerning actual use of the hotel.

We granted the City's petition for review.

II. DISCUSSION

With the above background, we may proceed to resolve the issues raised by the parties. We address, first, the correctness of the trial court's denial of the petition for writ of administrative mandate; second, the proper level of scrutiny applicable to plaintiffs' claim that the HCO housing-

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inapposite for several reasons, including that it predated enactment of the Mitigation Fee Act (Gov. Code, § 66000 et seq.), which allows a developer to pay a mitigation fee under protest and subsequently litigate its validity. As the City did not challenge this holding in its petition for review or its brief on the merits in this court, its correctness is not before us.

replacement fee constituted a taking of their property without just compensation; and third, the merits of plaintiffs' facial and as-applied attacks on the HCO.

A. *Did San Francisco Properly Require Plaintiffs to Obtain a Conditional Use Permit for Full Tourist Use of the Hotel?*

(2) As already explained, San Francisco's zoning administrator, in a decision affirmed by the Board of Permit Appeals, determined that the proposed operation of the San Remo Hotel in full tourist use required plaintiffs to apply for and obtain a conditional use permit. After analysis, we conclude the trial court correctly denied the petition for writ of administrative mandate challenging this administrative decision.

Before the zoning administrator and in the trial court, plaintiffs contended that no conditional use permit was needed because tourist rental of the hotel was a permitted conditional use under the San Francisco Planning Code. A permitted conditional use in a neighborhood commercial district must have "lawfully existed" on the effective date of the 1987 neighborhood commercial district ordinance. (S.F. Planning Code, § 179, subd. (a)(2).) Section 178, subdivision (a)(2) of the same code defines the same term, in its more general application, as a use that "lawfully existed" at the time such uses became subject to a conditional use permit requirement. Although plaintiffs, echoing the Court of Appeal, focus on the "lawfulness" of tourist use under the 1981 HCO, a prior consideration is whether, and to what extent, tourist use of the San Remo Hotel "existed" as of 1987 or as of the time the San Remo first became subject to a conditional use permit requirement for tourist use, apparently by interim measures first added in 1982.

The administrative record shows that both residential and tourist rentals were significant uses of the San Remo Hotel at the relevant times. The zoning administrator cited annual unit usage reports filed by the San Remo Hotel with the Bureau (and later, the Department) of Building Inspection, which showed that during the period 1982 to 1992, between 25 and 57 units in the 62-unit hotel were occupied by residents. City hotel tax records from the last part of that period show that, even in the summer, a significant part of the San Remo's rental revenue was derived from (nontaxable) residential rentals, which constituted the majority of revenues in some autumn and winter seasons. As of May 1991, according to a hearing officer's decision allowing summer tourist rentals at the San Remo Hotel, some San Remo residents had occupied their rooms for as long as 10 years. A similar ruling in May 1989 noted that 15 to 20 of the residents then living at the San Remo had been there for six months or longer, some for "many years." Thus, the record supports the Board of Permit Appeals' finding that the San Remo Hotel was operated "at least in part" as a residential hotel in the early and mid-1980's.

In their application for HCO conversion, plaintiffs sought *not* to maintain the status quo but, in the words of their complaint, to "convert the San Remo Hotel's residentially designated hotel rooms [i.e., all the hotel's rooms] to tourist use." That application, according to plaintiffs, prompted the City to require a conditional use permit. Thus, as the zoning administrator understood plaintiffs' application, they sought authorization "to convert all of the units of the hotel to tourist use."

The zoning administrator correctly determined that such conversion required a conditional use permit even if some tourist use had previously lawfully existed. A permitted

conditional use may continue "in the form in which it lawfully existed," but "may not be significantly altered, enlarged, or intensified, except upon approval of a new conditional use application." (S.F. Planning Code, § 178, subds. (b), (c).) Clearly a change from *partial* tourist use to *complete* tourist use would be a significant alteration or enlargement of the existing use, requiring a new conditional use permit.

We agree with plaintiffs that the superior court erred in stating, "The only lawful use of the San Remo . . . was residential." The 1981 version of the HCO allowed vacant residential units to be rented on a short-term basis during the May to September tourist season. Since such rentals were also permitted under the San Remo Hotel's historical zoning (i.e., that preceding the 1982 and 1987 zoning changes), some tourist use lawfully existed prior to the 1982 and 1987 zoning restrictions. But the lawful *temporary* rental of *vacant* residential units, permitted with the further restriction that such units must immediately revert to residential use if needed (1981 HCO, § 41.16, subd. (a)(3)(B)), was not authority to use the hotel's rooms *full time* for tourist use, regardless of residential occupancy or demand. As the superior court observed, "This temporary tourist use is not a change of use under the Planning Code." Again, such full-time unrestricted tourist rental would be a significant alteration or enlargement of the historical lawful use, requiring new conditional use permission under San Francisco Planning Code section 178, subdivision (c). Plaintiffs do not claim that the actual tourist use of the San Remo Hotel went beyond that permitted by the HCO, nor does the record contain evidence of such illegally extensive use in the relevant period; indeed, plaintiff Robert Field stated in the trial court that plaintiffs had always complied with the HCO. Even as to those rooms that had, on occasion, been lawfully rented to tourists, therefore, the zoning administrator and Board of Permit Appeals were

correct to require a conditional use permit for permanent tourist use.

Plaintiffs attribute to the City the argument that "the San Remo Hotel's zoning classification as a tourist hotel was changed by the 1981 [HCO]." To rebut the City's supposed claim, plaintiffs cite a 1981 opinion letter by the San Francisco City Attorney that stated the then proposed HCO was not a zoning law and thus could be enacted without a hearing before the San Francisco Planning Commission. (S.F. City Atty., Opn. No. 81-54 (Sept. 14, 1981) pp. 7-8.) In reply, the City disavows any claim that the HCO changed the San Remo Hotel's zoning status, but insists that "the trial court correctly considered the HCO as a legal restriction on the use of the hotel." As we have explained, however, the critical issue in this case is *not the lawfulness* of the historical tourist use, *but its extent*. The HCO's restrictions on tourist use are pertinent in that they limited the hotel's actual tourist use during the 1980's. But, as plaintiffs do not claim they engaged in any tourist use beyond what the HCO permitted, and the record shows no such unauthorized use before 1987, we are not concerned here with whether tourist rentals in violation of the HCO would or would not have constituted a "lawful" use for purposes of the Planning Code provisions on permitted conditional uses. The record demonstrates that prior to 1987 the San Remo Hotel had substantial residential use and, as plaintiffs do not dispute, tourist use was restricted, in compliance with the HCO, to summer rentals of vacant units. Conversion to complete full-time tourist use would therefore be a significant expansion of the hotel's historical tourist use, requiring a conditional use permit. Nothing in the City

Attorney's 1981 opinion alters our analysis or affects our conclusion.[10]

The Court of Appeal also criticized the City (i.e., the zoning administrator and the Board of Appeals) for characterizing the San Remo Hotel's historical residential use as "group housing" when, at the same time, the San Remo operated under a City-issued "hotel" permit and paid "hotel" taxes. In response, the City cites a zoning provision (S.F. Planning Code, § 209.2, subd. (a)), added in 1978, that defines the housing use category "Group housing, boarding," in a manner that, on its face, arguably includes a residential hotel. But another part of the same section, also dating from 1978, defines the use "Hotel, inn or hostel," in a manner that

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[10] The parties and the Court of Appeal address, at points, the question whether tourist use of the San Remo Hotel qualifies as a "lawful nonconforming use." Like a permitted conditional use, a lawful nonconforming use is one that existed lawfully at the time a new zoning prohibition or restriction came into force, the difference being that a permitted conditional use is conditionally *permitted* by the new zoning law, while a nonconforming use is *prohibited* by that law. (*See* S.F. Planning Code, §§ 178, subd. (a)(2), 180, subd. (a)(1); *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal. 4th 533, 540, fn. 1 [48 Cal. Rptr. 2d 778, 907 P.2d 1324].) Since tourist hotels are a conditionally permitted, rather than a prohibited, use in the North Beach district (S.F. Planning Code, § 722.55), a tourist use, if it had lawfully existed before the neighborhood commercial district restrictions became effective, would be classified as a permitted conditional use rather than a lawful nonconforming use. But regardless of terminology, the same result obtains in this case, since the rule against expansion or alteration of an existing use applies to nonconforming uses as well as to permitted conditional uses. (S.F. Planning Code, §§ 178, subd. (c), 181, subd. (a); *Hansen Brothers Enterprises, Inc.*, *supra*, at p. 552.)

includes the San Remo Hotel's historic use *if* the San Remo's rooms were, during the relevant period, used "*primarily* for the accommodation of transient overnight guests" (*id.*, subds. (d), (e), italics added), a question not clearly answered by the administrative record excerpt in the appellate record. Nor does the 1978 law appear to preclude a mixed-use hotel from having both classifications.

Fortunately, we need not determine the correct zoning categorization of the San Remo Hotel's pre-1987 use in order to decide this case. The question before us is whether plaintiffs' proposed full tourist use of the hotel qualifies as a permitted conditional use under the current zoning laws. As we have seen, such use does qualify to the extent it lawfully existed when the current laws' restrictions came into effect, but does not qualify to the extent plaintiffs propose to significantly alter or expand it. This is true regardless of whether the San Remo was historically classified as a hotel, as group housing, or both.

In classifying uses for purposes of neighborhood commercial district zoning, we are directed to consider separately each use in a multiple-use structure. (S.F. Planning Code, § 703.2, subd. (b)(1).) That the San Remo might legitimately have been classifiable as a "Hotel, inn or hostel" under the 1978 zoning law (*id.*, § 209.2, subd. (e)) or a "Hotel, tourist" under the 1987 neighborhood commercial district law (*id.*, § 790.46) *as well as* a "hotel, residential" (*id.*, § 790.47) is therefore not determinative. (*Cf. Tenderloin Housing Clinic, Inc. v. Astoria Hotel, Inc.* (2000) 83 Cal. App. 4th 139, 144, fn. 2 [98 Cal. Rptr. 2d 924] [hotel with 13 rooms designated for tourist use and 79 for residential use was both a tourist hotel and a residential hotel under the Planning Code].) The historical extent of tourist use itself determines the extent to which the San Remo Hotel can,

under current law, be put to that use without conditional use permits.

Both minority opinions misapprehend the factual context in which the conditional use permit was issued. The concurring and dissenting opinion, which would have us remand the case for factual findings (conc. & dis. opn., *post*, at pp. 683-684), proceeds on the incorrect assumption that conditional use permits are issued on a room-by-room basis, and that a determination of the precise number of rooms in tourist use when the conditional-use permit requirement came into effect would materially affect the permit requirement (*id.* at pp. 682-685). Contrary to suggestions in the concurring and dissenting opinion, the number of rooms for which a new tourist use was proposed is of no import as to whether a conditional use permit was required in the first instance, so long as some expansion of tourist use was proposed. Nor did the conditional use permit specify the number of rooms subject to one-to-one replacement under the HCO, calculate the in lieu replacement fee to be assessed, or impose any other condition dependent on the number of rooms previously in tourist use. Because the record shows *some residential use* at all relevant times, and because plaintiffs' tourist use of the hotel was, as required under the HCO, *temporary* and *subject to preemption by residential demand*, a conditional use permit was required regardless of the exact number of rooms being rented to tourists at any time. Hence, no basis exists for "grandfather[ing]" tourist use in either the entire hotel or individual rooms as a permitted conditional use, as the concurring and dissenting opinion argues should have been done. (Conc. & dis. opn., *post*, at pp. 682-685.)

The dissent argues at length that the City Planning Commission acted in violation of the state Ellis Act (Gov. Code, §§ 7060- 7060.7), which allows the withdrawal of

residential accommodations from the market. (Dis. opn., *post*, at pp. 694-695, 698-699.) This argument founders on the stubborn fact that, so far as the record or briefing here shows, plaintiffs never took the measures necessary to invoke their statutory rights under the act. (*See* Gov. Code, § 7060.4 [permitting local governments to establish notice requirements for withdrawal of accommodations]; S.F. Admin. Code, § 7.9A(f) [establishing such notice requirements].) Hence, we have no occasion here to discuss the preemptive effect of the Ellis Act addressed in *Bullock v. City and County of San Francisco* (1990) 221 Cal. App. 3d 1072 [271 Cal. Rptr. 44], where the plaintiff hotel owner had "in no uncertain terms and in accordance with the [Ellis Act] procedures established by the City, advised the City of his intent to depart the business of renting residential hotel units." (*Id.* at p. 1100.) Nor, contrary to the dissent's suggestion, can the Ellis Act be read as occupying the fields of local real property regulation, zoning, or residential hotel regulation. (*See* Gov. Code, § 7060.1, subds. (b), (c).)

Similarly, the dissent's claim that "the planning commission chose to require HCO compliance and thereby used the leverage it gained . . . to exact a $567,000 fee" (dis. opn., *post*, at p. 696) misrepresents the facts in the appellate record. In their application for a conditional use permit, plaintiffs--who had already applied for a conversion permit under the HCO (see *ante*, at p. 656)--assured the planning commission that they would comply with the HCO. The commission incorporated that assurance as a condition of the permit, *but did not itself assess any fee*.

Because, as the administrative record demonstrates, tourist use of the San Remo Hotel before enactment of the conditional use requirements neither encompassed all the hotel's units nor occurred full time without regard to

residential occupancy and demand, plaintiffs' proposal to convert to full-time tourist use constitutes an expansion of the hotel's historical use requiring conditional use authorization. Consequently, the trial court correctly denied the petition for writ of administrative mandate, and the Court of Appeal erred in reversing this aspect of the trial court's judgment.

B. *Are In Lieu Fees Assessed Under the HCO Subject to Heightened Scrutiny?*

(3a) The takings clause of the California Constitution (art. I, § 19) provides: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." The federal takings clause (U.S. Const., 5th Amend.) provides: "nor shall private property be taken for public use without just compensation."

(4) By virtue of including "damage[]" to property as well as its "tak[ing]," the California clause "protects a somewhat broader range of property values" than does the corresponding federal provision. (*Hensler v. City of Glendale* (1994) 8 Cal. 4th 1, 9, fn. 4 [32 Cal. Rptr. 2d 244, 876 P.2d 1043]; accord, *Varjabedian v. City of Madera* (1977) 20 Cal. 3d 285, 298 [142 Cal. Rptr. 429, 572 P.2d 43]; see *Bacich v. Board of Control* (1943) 23 Cal. 2d 343, 350 [144 P.2d 818]; *Reardon v. San Francisco* (1885) 66 Cal. 492, 501 [6 P. 317].) But aside from that difference, not pertinent here, we appear to have construed the clauses congruently. (*See, e.g., Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal. 4th 952, 957, 962-975 [81 Cal. Rptr. 2d 93, 968 P.2d 993] (*Santa Monica Beach*) [takings challenge to rent control regulation under both clauses considered without separate discussion of the state clause]; *Hensler v. City of Glendale*, *supra*, at p. 9, fn. 4 [conclusion that U.S. Const., 5th Amend.

was not violated "applies equally" to Cal. Const., art. I, § 19].) Despite plaintiffs' having sought relief in this court only for a violation of article I, section 19 of the California Constitution, therefore, we will analyze their takings claim under the relevant decisions of both this court and the United States Supreme Court.

(5) "In determining whether a government regulation of property works a taking of property under the Fifth Amendment to the United States Constitution, the United States Supreme Court has generally eschewed any 'set formula' for determining whether a taking has occurred, preferring to engage in '"essentially ad hoc, factual inquiries"' (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015 [112 S. Ct. 2886, 2893, 120 L. Ed. 2d 798]), which focus in large part on the economic impact of the regulation (*see Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 124 [98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631]; *Keystone Bituminous Coal Assoc. v. DeBenedictis* (1987) 480 U.S. 470, 493-501 [107 S. Ct. 1232, 1246-1250, 94 L. Ed. 2d 472]). . . . Other than this ad hoc inquiry, the court has held categorically that property is taken when a government regulation 'compel[s] [a] property owner to suffer physical "invasion" of his property' or 'denies all economically beneficial or productive use of land.' (*Lucas*, *supra*, 505 U.S. at pp. 1015-1016 [112 S. Ct. at p. 2893].) The court has also stated that 'the Fifth Amendment is violated when a land-use regulation "does not substantially advance legitimate state interests."' (*Lucas*, *supra*, 505 U.S. at p. 1016 [112 S. Ct. at p. 2894].)" (*Santa Monica Beach*, *supra*, 19 Cal. 4th at p. 964.)

(3b) As in *Santa Monica Beach*, it is the last-mentioned prong of the high court's takings analysis that is at issue here. In particular, the parties debate whether a heightened level of

means-ends scrutiny, the force and application of which has been developed in *Nollan*, *supra*, 483 U.S. 825, *Dolan*, *supra*, 512 U.S. 374, *Ehrlich*, *supra*, 12 Cal. 4th 854, and *Santa Monica Beach*, *supra*, 19 Cal. 4th 952, applies to review of the conversion fee the City required plaintiffs to pay under the HCO.

In *Nollan*, a California agency conditioned its approval for the plaintiffs to rebuild a beachfront house on their dedication of a public easement providing lateral access across their portion of the beach. Although the easement would constitute a physical invasion of property, the high court recognized it could nonetheless be demanded as a condition of the development permit, if the permit could otherwise have been denied and if the easement condition "serve[d] the same legitimate police-power purpose as a refusal to issue the permit." (*Nollan*, *supra*, 483 U.S. at p. 836 [107 S. Ct. at p. 3148].) "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." (*Id.* at p. 837 [107 S. Ct. at pp. 3148-3149].) Without this "essential nexus," between the permit condition and the development ban, "the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" (*Ibid.*)

Because the conditional exaction in *Nollan* failed to meet "even the most untailored standards" (*Nollan*, *supra*, 483 U.S. at p. 838 [107 S. Ct. at p. 3149]), the court did not need to elucidate with any precision the required "fit" between the exaction and its purposes. But the court cautioned that, when the circumstances created a potential for the government to extort property by withholding otherwise unrelated permits, judicial scrutiny would be searching: "[O]ur cases describe the condition for abridgment of

property rights through the police power as a '*substantial* advanc[ing]' of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." (*Id.* at p. 841 [107 S. Ct. at pp. 3150-3151].) "Thus in *Nollan*, the rule that the government's physical occupation of private property is a per se taking is transformed, in the context of a development application, into a rule of heightened scrutiny to ensure that a required development dedication is not a mere pretext to obtain or otherwise physically invade property without just compensation." (*Ehrlich*, *supra*, 12 Cal. 4th 854, 890 (conc. opn. of Mosk, J.).)

Dolan, like *Nollan*, involved a government agency's conditioning a development permit on dedication of a portion of the applicant's real property. In *Dolan*, the high court addressed the question it had reserved in *Nollan*, the "required degree of connection between the exactions and the projected impact of the proposed development." (*Dolan*, *supra*, 512 U.S. at p. 386 [114 S. Ct. at p. 2317].) The court concluded that a " 'rough proportionality'" standard "best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (*Id.* at p. 391 [114 S. Ct. at pp. 2319-2320].)

The *Dolan* court also briefly addressed the scope of applicability of the heightened scrutiny and shifted burden of persuasion outlined in that decision and in *Nollan*: "Justice

Stevens' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. [Citation.] Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city." (*Dolan, supra*, 512 U.S. at p. 391, fn. 8 [114 S. Ct. at p. 2320].) Most land use regulations "involve[] essentially legislative determinations classifying . . . areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel." (*Id.* at p. 385 [114 S. Ct. at p. 2316].)

In *Ehrlich*, this court addressed the question of whether the heightened scrutiny outlined in *Nollan* and *Dolan* applied to a *monetary* exaction. The defendant city in *Ehrlich* had conditioned permits for the development of a condominium complex on the site of a former private tennis club on the owner's payment of a $280,000 fee to be used for city recreational facilities. Though the members of this court disagreed on various parts of the analysis, we unanimously held that this ad hoc monetary exaction *was* subject to *Nollan/Dolan* scrutiny. (*Ehrlich*, *supra*, 12 Cal. 4th at pp. 874-881 (plur. opn. of Arabian, J.); *id.* at pp. 899-901 (conc. opn. of Mosk, J.); *id.* at p. 907 (conc. & dis. opn. of Kennard, J.); *id.* at p. 912 (conc. & dis. opn. of Werdegar, J.).) In such cases, the exaction must be more than "theoretically" or "plausibly" related to the ends that would be served by permit denial; *Nollan* and *Dolan* require "a *factually* sustainable proportionality between the effects of a proposed land use and a given exaction." (*Ehrlich*, *supra*, at p. 880 (plur. opn. of Arabian, J.).)

In holding the fee at issue subject to *Nollan/Dolan*, we emphasized that because the city had exercised its discretionary powers in imposing and calculating the recreational impact fee, rather than doing so pursuant to a legislative mandate or formula, imposition of the fee bore much the same potential for illegitimate leveraging of private property as did the real property exactions in *Nollan* and *Dolan*. Thus, the plurality concluded that heightened scrutiny was appropriate "[w]hen such exactions are imposed--as in this case--neither generally nor ministerially, but on an individual and discretionary basis." (*Ehrlich*, *supra*, 12 Cal. 4th at p. 876, 50 Cal. Rptr. 2d 242, 911 P.2d 429 (plur. opn. of Arabian, J.).) The plurality further distinguished "*generally* applicable development fee[s] or assessment[s]," as to which "the courts have deferred to legislative and political processes," from "special, discretionary permit conditions" like the one at issue in *Ehrlich*. (*Id.* at p. 881.) Justice Mosk, concurring, explained that although "general governmental fees" are "judged under a standard of scrutiny closer to the rational basis review of the equal protection clause than the heightened scrutiny of *Nollan* and *Dolan*" (*id.* at p. 897 (conc. opn. of Mosk, J.)), "when a municipality singles out a property developer for a development fee not imposed on others, a somewhat heightened scrutiny of that fee is required to ensure that the developer is not being subject to arbitrary treatment for extortionate motives" (*id.* at p. 900). Finally, Justice Kennard agreed that "[b]ecause the $280,000 recreational mitigation fee was imposed on Ehrlich's development application individually, and not pursuant to an ordinance or rule of general applicability, the constitutionality of this fee is evaluated using the *Nollan-Dolan* 'essential nexus' and 'rough proportionality' analysis." (*Id.* at p. 907 (conc. & dis. opn. of Kennard, J.).)

A majority in *Ehrlich* further agreed that to the extent a development mitigation fee is *not* subject to heightened scrutiny under *Nollan* and *Dolan*, there must nonetheless be a "reasonable relationship" between the fee and the deleterious impacts for mitigation of which the fee is collected. (*Ehrlich*, *supra*, 12 Cal. 4th at pp. 865, 867 (plur. opn. of Arabian, J.); *id.* at p. 897 (conc. opn. of Mosk, J.).)

In *Santa Monica Beach*, *supra*, 19 Cal. 4th 952, considering a challenge to a municipal rent control ordinance, we reviewed and synthesized the prior decisions as follows. "From the above, it can be inferred that the 'substantially advance' standard in the takings context is applied differently depending on the type of government action under consideration. As *Nollan* and *Dolan* both attest, government requirements that property owners dedicate land as a condition of receiving a development permit will receive the highest scrutiny—a type of intermediate scrutiny in which a government's dedication requirements will pass constitutional muster as long as the government 'make[s] some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.' (*Dolan*, *supra*, 512 U.S. at p. 391 [114 S. Ct. at pp. 2319-2320], fn. omitted.) . . . The most deferential review of land use decisions appears to be for those that pertain to 'essentially legislative determinations' that do not require any physical conveyance of property." (*Santa Monica Beach*, *supra*, 19 Cal. 4th at p. 966, quoting *Dolan*, *supra*, 512 U.S. at p. 385 [114 S. Ct. at p. 2316].)

"We recognized these different levels of takings scrutiny in [*Ehrlich*, *supra*, 12 Cal. 4th 854]. We rejected the claim that the *Nollan* and *Dolan* standards do not apply to development fees imposed on an individualized basis as a condition for development. . . . But a different standard of

scrutiny would apply to development fees that are generally applicable through legislative action 'because the heightened risk of the "extortionate" use of the police power to exact unconstitutional conditions is not present.' (*Id.* at p. 876; *see* also *id.* at p. 897 (conc. opn. of Mosk, J.); *id.* at p. 903 (conc. and dis. opn. of Kennard, J.).) Thus, individualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan*," while generally applicable development fees warrant a more deferential type of review. (*Santa Monica Beach*, *supra*, 19 Cal. 4th at pp. 966-967.)

The Court of Appeal held that housing replacement fees assessed under the HCO were subject to *Nollan/Dolan/Ehrlich* review because they were exacted discretionarily and applied only to a relatively small number of property owners rather than to "every other property in the City." Plaintiffs defend that analysis, while the City argues for the more deferential constitutional scrutiny applicable to land use regulations made generally applicable by legislative enactment to a class of property owners.

We agree with the City. Contrary to the Court of Appeal's assertion, and unlike *Ehrlich*, the HCO does not provide City staff or administrative bodies with any discretion as to the imposition or size of a housing replacement fee. Under the HCO, the responsible city agency, the Department (formerly the Bureau) of Building Inspection, "shall . . . deny" an application to convert residential units to tourist use if the housing replacement requirement is not satisfied and "shall issue" the permit if the ordinance's requirements, including that for housing replacement, are met. (HCO, §§ 41.14, 41.15.) The *applicant* chooses how to satisfy the replacement requirement, whether by constructing or bringing onto the market new units; by sponsoring such construction by a public

or nonprofit private housing developer; or by paying, in lieu of such construction, a fee to a designated City housing fund. (*Id.*, § 41.13.) If the applicant chooses the in lieu fee, its amount is determined according to a set formula based on replacement cost, which in turn is determined by a different City agency, the City's Department of Real Estate, through two independent appraisals. (*Ibid.*) Thus, no meaningful government discretion enters into either the imposition or the calculation of the in lieu fee.[11]

Nor did the City single out plaintiffs for payment of a housing replacement fee. The HCO is generally applicable legislation in that it applies, without discretion or discrimination, to every residential hotel in the city. All proposals to convert residential to tourist use are subject to the same ordinance. In suggesting that an ordinance, to be considered generally applicable, must apply to "every other property in the City," the Court of Appeal invoked an impossible standard, one that would be met by almost no rationally drawn land use regulation. The HCO applies to all property in the class logically subject to its strictures, that is, to all residential hotel units; no more can rationally be demanded of local land use legislation in order to qualify for deferential review. (We do not speak of a legislative "class"

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[11] That the planning commission allegedly required compliance with the HCO as a condition of the conditional use permit does not alter our conclusion as to City discretion. While issuance of a conditional use permit is generally discretionary (*see* S.F. Planning Code, §§ 303, 316, 316.8), conversion of residential rooms to commercial use is unconditionally *prohibited* above the first floor in the North Beach district *except* insofar as permitted by the HCO (S.F. Planning Code, §§ 722.38, 790.84). The planning commission, therefore, had no discretion to permit such change in use absent HCO compliance.

artificially tailored to encompass only a single property; no such claim has been or could be made as to the HCO.)[12]

In these respects a housing replacement fee assessed under the HCO stands in sharp contrast to the recreational facilities replacement fee we found subject to heightened scrutiny in *Ehrlich*. In that case, the city relied on no specific legislative mandate to impose the fee condition and no legislatively set formula to calculate its size. The condition was imposed ad hoc, entirely at the discretion of the city council and staff. (*Ehrlich*, *supra*, 12 Cal. 4th at p. 862.) So far as the court's opinions reveal, the plaintiff's property development proposal was the *only* one upon which such a fee condition had been imposed. We concluded that applying *Nollan/Dolan* review to such a "special, discretionary permit condition[]" (*Ehrlich*, *supra*, at p. 881 (plur. opn. of Arabian, J.)) was necessary "to ensure that the developer is not being subject to arbitrary treatment for extortionate motives" (*id.* at p. 900 (conc. opn.

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[12] According to the City, the ordinance applies to more than 500 properties containing (as stated in the 1990 HCO) more than 18,000 guest rooms. (HCO, § 41.3, subd. (d).) Plaintiffs accept these numbers but nonetheless characterize the City as imposing housing preservation costs on only "a few" property owners. The Court of Appeal, similarly, alluded to "a small group" of property owners as bearing the HCO's costs. Whether or not 500 or more property owners are properly deemed "a few" or a "small group," however, the critical fact remains that the HCO is generally and nondiscriminatorily applicable within a class of properties reasonably defined according to the purpose of the ordinance. (*See Penn Central Transp. Co. v. New York City*, *supra*, 438 U.S. at p. 132 [98 S. Ct. at p. 2663] [owners of landmarked properties not arbitrarily singled out to bear costs; law was a comprehensive plan to preserve historic structures, applying to over 400 landmarks and 31 historic districts throughout the city].)

of Mosk, J.)). At the same time, we distinguished cases such as the present one, involving a "*generally* applicable development fee or assessment" (*id.* at p. 881 (plur. opn. of Arabian, J.)) imposed not "individually" but "pursuant to an ordinance or rule of general applicability" (*id.* at p. 907 (conc. & dis. opn. of Kennard, J.)).

(6) The "sine qua non" for application of *Nollan/Dolan* scrutiny is thus the "discretionary deployment of the police power" in "the imposition of land-use conditions in individual cases." (*Ehrlich*, *supra*, 12 Cal. 4th at p. 869 (plur. opn. of Arabian, J.).) Only "individualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan*." (*Santa Monica Beach*, *supra*, 19 Cal. 4th at pp. 966-967; *see also Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal. 4th 1006, 1022 [73 Cal. Rptr. 2d 841, 953 P.2d 1188] (*Landgate*) [heightened scrutiny applies to "development fees imposed on a property owner on an individual and discretionary basis"].)

(3c) Under our precedents, therefore, housing replacement fees assessed under the HCO are not subject to *Nollan/Dolan/Ehrlich* scrutiny.

Plaintiffs argue that a legislative scheme of monetary exactions (i.e., a schedule of development mitigation fees) nevertheless should be subject to the same heightened scrutiny as the ad hoc fees we considered in *Ehrlich*, because of the danger a local legislative body will use such purported mitigation fees--unrelated to the impacts of development--simply to fill its coffers. Thus, plaintiffs hypothesize that absent careful constitutional scrutiny a city could "put zoning up for sale" by, for example, "prohibit[ing] all development except for one-story single-family homes, but offer[ing] a second story permit for $20,000, an apartment building

permit for $10,000 per unit, a commercial building permit for $50,000 per floor, and so forth."[13]

We decline plaintiffs' invitation to extend heightened takings scrutiny to all development fees, adhering instead to the distinction we drew in *Ehrlich*, *supra*, 12 Cal. 4th 854, *Landgate*, *supra*, 17 Cal. 4th 1006, and Santa Monica *Beach*, *supra*, 19 Cal. 4th 952, between ad hoc exactions and legislatively mandated, formulaic mitigation fees. While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.

Nor are plaintiffs correct that, without *Nollan/Dolan/Ehrlich* scrutiny, legislatively imposed development mitigation fees are subject to no meaningful means-ends review. As a matter of both statutory and constitutional law, such fees must bear a reasonable

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[13] Alternatively, plaintiffs suggest that "[i]f this Court believes that some degree of scrutiny less than *Nollan* and *Dolan* is appropriate for legislative exactions," we could articulate a lesser standard by shifting the burden of proof to the property owner while maintaining the substantive *Nollan/Dolan* test. This case having been decided on demurrer, the burden of proof is not at issue; we assume the facts as pled in the second amended complaint. We therefore decline to address burden of proof issues here.

relationship, in both intended use and amount, to the deleterious public impact of the development. (Gov. Code, § 66001; *Ehrlich*, *supra*, 12 Cal. 4th at pp. 865, 867 (plur. opn. of Arabian, J.); *id.* at p. 897 (conc. opn. of Mosk, J.); *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal. 3d 633, 640 [94 Cal. Rptr. 630, 484 P.2d 606, 43 A.L.R.3d 847].) Plaintiffs' hypothetical city could only "put [its] zoning up for sale" in the manner imagined if the "prices" charged, and the intended use of the proceeds, bore a reasonable relationship to the impacts of the various development intensity levels on public resources and interests. While the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees subject to *Ehrlich*, the arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster.

(7) Finally, we should not lose sight of the constitutional background. "To put the matter simply, the taking of money is different, under the Fifth Amendment, from the taking of real or personal property. The imposition of various monetary exactions--taxes, special assessments, and user fees--has been accorded substantial judicial deference." (*Ehrlich*, *supra*, 12 Cal. 4th at p. 892 (conc. opn. of Mosk, J.).) "There is no question that the takings clause is specially protective of property against *physical occupation* or invasion . . . . It is also true . . . that government generally has greater leeway with respect to noninvasive forms of land-use regulation, where the courts have for the most part given greater deference to its power to impose broadly applicable fees, whether in the form of taxes, assessments, user or development fees." (*Id.* at pp. 875-876 (plur. opn. of Arabian, J.).)

(3d) *Nollan* and *Dolan* involved the government's exaction of an interest in specific real property, not simply the payment of a sum of money from any source available; they have generally been limited to that context. (*See*, *e.g.*, *Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999) 526 U.S. 687, 703 [119 S. Ct. 1624, 1635, 143 L. Ed. 2d 882] [*Dolan* "inapposite" to permit denial]; *Clajon Production Corp. v. Petera* (10th Cir. 1995) 70 F.3d 1566, 1578 [heightened scrutiny limited to exaction of real property]; *Commercial Builders v. Sacramento* (9th Cir. 1991) 941 F.2d 872, 875 [*Nollan* inapplicable to housing mitigation fee]; *cf. United States v. Sperry Corp.* (1989) 493 U.S. 52, 62, fn. 9 [110 S. Ct. 387, 395, 107 L. Ed. 2d 290] ["It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible"].) In *Ehrlich*, we extended *Nollan* and *Dolan* slightly, recognizing an exception to the general rule of deference on distribution of monetary burdens, because the ad hoc, discretionary fee imposed in that case bore special potential for government abuse. We continue to believe heightened scrutiny should be limited to such fees. (Accord, *Krupp v. Breckenridge Sanitation Dist.* (Colo. 2001) 19 P.3d 687, 698 [to the extent *Nollan/Dolan* review applies to purely monetary fees, it is limited to "exactions stemming from adjudications particular to the landowner and parcel"].) Extending *Nollan* and *Dolan* generally to all government fees affecting property value or development would open to searching judicial scrutiny the wisdom of myriad government economic regulations, a task the courts have been loath to undertake pursuant to either the takings or due process clause. (*See*, *e.g.*, *Dolan*, *supra*, 512 U.S. at p. 384 [114 S. Ct. at p. 2316] [reiterating "the authority of state and local governments to engage in land use planning" even when such regulation diminishes individual property values]; *Penn Central Transp. Co. v. New York City*, *supra*, 438 U.S. at p.

133 [98 S. Ct. at p. 2664] [that landmarks law burdens have more severe impact on some landowners than others does not render its application a taking: "Legislation designed to promote the general welfare commonly burdens some more than others"]; *Usery v. Turner Elkhorn Mining Co.* (1976) 428 U.S. 1, 19 [96 S. Ct. 2882, 2894, 49 L. Ed. 2d 752] [wisdom of particular cost-spreading scheme "not a question of constitutional dimension"].)

C. *Merits of Plaintiffs' Takings Claims*

(8a) Plaintiffs attack the housing replacement provisions of the HCO both on their face and as applied to the San Remo Hotel. In the discussion that follows, we address only the substantive contentions made in this court by the plaintiffs.[14]

Challenging the ordinance on its face, plaintiffs assert there is no connection between the housing replacement fees assessed and the housing lost by conversion to tourist use. We conclude, to the contrary, that the housing replacement fees bear a reasonable relationship to loss of housing. Under the ordinance, the amount of the in lieu fee is based on the number of rooms being converted from residential to tourist designation; the number of rooms designated residential is, in turn, based on the self-reported use as of September 23, 1979,

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[14] The concurring and dissenting opinion, in criticizing us first for addressing these issues at all (conc. & dis. opn., *post*, at pp. 687-688) and then for failing to address issues that have *not* been raised in this court (*id.* at pp. 690-691), seemingly ignores the choices plaintiffs have made in refining their claims as they climbed the appellate ladder. In particular, had plaintiffs wished to resurrect theories asserted in their pleading, but not raised in the City's petition for review, they could have done so by answer to the petition. (*See* Cal. Rules of Court, rule 28(e)(5).)

shortly before a City moratorium on residential hotel conversion first came into force. (HCO, § 41.3, subd. (g).) On its face, the use of a defined historical measurement point is reasonably related to the HCO's housing preservation goals (*see* HCO, §§ 41.2, 41.3), and the use of individualized self-reported survey results, with inspection by City staff if needed, and opportunities for appeal by the hotel owner or challenge by other interested parties (HCO, § 41.6), is a facially reasonable means of determining initial status. Plaintiffs fail to demonstrate from the face of the ordinance that fees assessed under the HCO bear no reasonable relationship to housing loss in the *generality* or *great majority* of cases, the minimum showing we have required for a facial challenge to the constitutionality of a statute. (*See Kasler v. Lockyer* (2000) 23 Cal. 4th 472, 502 [97 Cal. Rptr. 2d 334, 2 P.3d 581]; *California Teachers Assn. v. State of California* (1999) 20 Cal. 4th 327, 345, 347 [84 Cal. Rptr. 2d 425, 975 P.2d 622]; *id.* at pp. 358-359 (dis. opn. of Werdegar, J.).)[15]

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[15] In support of their claim of a lack of "nexus" between the City's housing goals and the in lieu fees assessed under the HCO, plaintiffs rely on *Seawall Associates v. City of New York* (1989) 74 N.Y.2d 92 [544 N.Y.S.2d 542, 542 N.E.2d 1059], in which an ordinance similar in some ways to the HCO (but differing in some respects as well) was found to work a facial taking of hotel owners' property. But in finding that the ordinance did not substantially advance the city's goal of alleviating homelessness, the New York court explicitly exercised the heightened scrutiny described in *Nollan*, which, of course, we have concluded does not apply to the HCO's in lieu fees. (*Seawall*, *supra*, at pp. 1068-1069.) The *Seawall* court, moreover, applied *Nollan* to burdensome land use restrictions generally, not only to exactions imposed as conditions of permit approvals. (*See Seawall*, *supra*, at p. 1068 [discussing the ordinance's "ban on converting, destroying and warehousing [single-room occupancy] units"].) To that extent, *Seawall* was impliedly overruled by *Monterey v. Del Monte Dunes at Monterey*,

Plaintiffs also assert the City has admitted, in the HCO itself, that the in lieu fees assessed are intended to raise money rather than mitigate the loss of housing. They cite to HCO section 41.3, subdivision (m), a legislative finding in the 1990 ordinance explaining why the in lieu fees were raised from 40 percent of replacement cost to 80 percent. That finding states that the 40 percent figure was found inadequate because of lower than expected contributions by government sources. "Federal, state and local funds were incorrectly assumed at that time to be available and sufficient to make up the shortfall between the 40 percent in lieu fee and actual replacement costs. For example, in 1979 the federal government was spending 32 billion dollars on housing and is spending only 7 billion dollars in 1989." (HCO, § 41.3, subd. (m).) Contrary to plaintiffs' suggestion, this finding does not tend to show an impermissible revenue-raising purpose for the in lieu fees, but only the legitimate purpose of more fully funding the replacement of housing lost through conversion.

We note, as well, that the structure of the HCO's housing replacement provisions rebuts plaintiffs' claim that they are intended merely to raise general revenue. No hotel owner is required to pay a fee to the City as a condition of conversion. Rather, to comply with the replacement provisions and receive a conversion permit, an owner may construct comparable housing units for rent; bring units onto the market from any building not subject to the HCO; construct or

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Ltd., *supra*, 526 U.S. at pages 702-703 [119 S. Ct. at pages 1634-1635], in which the high court held heightened scrutiny was "inapposite" to permit denials and other land use restrictions not involving exactions. The New York Court of Appeals acknowledged the overruling in *Bonnie Briar Syndicate v. Mamaroneck* (1999) 94 N.Y.2d 96 [699 N.Y.S.2d 721, 721 N.E.2d 971, 975].)

rehabilitate, even at less than a one-to-one ratio, apartment units for elderly, disabled or low-income renters, or transitional or emergency housing; or contribute to a private nonprofit housing developer for construction of comparable units. (HCO, § 41.13, subd. (a)(1)-(3), (5).) Even when the hotel owner chooses to pay a fee in lieu of such replacement, the fee is not paid to the City's general fund but to a separate residential hotel preservation account. (HCO, § 41.13, subd. (a)(4).) The HCO was clearly not designed as a means of raising general revenue.

In their last facial claim, plaintiffs assert that the HCO does not preserve available housing because "[t]iny hotel rooms without baths and without kitchens are not housing." We disagree. While a single room without a private bath and kitchen may not be an ideal form of housing, such units accommodate many whose only other options might be sleeping in public spaces or in a City shelter. Plaintiffs do not dispute that San Francisco has long suffered from a shortage of affordable housing or that residential hotel units serve many who cannot afford security and rent deposits for an apartment. (*See* HCO, § 41.3, subds. (a)-(f).) Maintaining the availability of residential hotel rooms is a reasonable means of serving one segment of San Franciscans' housing needs.[16]

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[16] We note as well that plaintiffs' challenge in this respect goes not to the housing replacement fee, or to any other exaction made as a condition of permit approval, but to the City's underlying reasons for restricting residential hotel conversion. A challenger to the justification for such a legislatively imposed, generally applicable restriction on changes in real property use "bears the burden of proving that the regulation 'constitutes an arbitrary regulation of property rights.'" (*Santa Monica Beach*, *supra*, 19 Cal. 4th at p. 966, quoting *Dolan*, *supra*, 512 U.S. at p. 391, fn. 8 [114 S. Ct. at p. 2320].) Other than to assert that single-room

Our dissenting colleague argues that the HCO constitutes a facial taking because, in the well-known phrase of Justice Holmes, it affords insufficient "'reciprocity of advantage'" to owners of the hotels affected. (Dis. opn., *post*, at pp. 701, 702, quoting *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 415 [43 S. Ct. 158, 160, 67 L. Ed. 322, 28 A.L.R. 1321] (*Penna. Coal Co.*).) The dissent would apparently approve an economic regulation affecting property only if each property owner restricted by the regulation were guaranteed, at the same time, a proportionate benefit from the same regulation. Whether Holmes's conception of the justifiable regulation of property was as narrow as the dissent's is unclear, but, in any case, such a restrictive view has generally not controlled the development of takings law.

In *Penna. Coal Co.* itself, Justice Brandeis observed that in many cases where the high court had approved the exercise of police powers to regulate the use of property, the burdened property owner had received no reciprocal benefit from the regulation "unless it be the advantage of living and doing business in a civilized community." (*Penna. Coal Co.*, *supra*, 260 U.S. at p. 422 [43 S. Ct. at p. 163] (dis. opn. of Brandeis, J.).) In the many difficult cases that have followed, it has generally been the Brandeis view that has prevailed: "Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. [Footnote 21:] *The Takings Clause has never been read to require the States or the courts to calculate whether a specific*

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rentals cannot be considered housing, a view we reject, plaintiffs make no attempt at such a showing.

individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received." (*Keystone Bituminous Coal Assn. v. DeBenedictis*, *supra*, 480 U.S. at p. 491 & fn. 21 [107 S. Ct. at p. 1245], italics added; *see also Penn Central Transp. Co. v. New York City*, *supra*, 438 U.S. at p. 133 [98 S. Ct. at p. 2664] (*Penn Central*) ["that the Landmarks Law has a more severe impact on some landowners than on others . . . does not mean that the law effects a 'taking'"]; *Agins v. Tiburon* (1980) 447 U.S. 255, 262 [100 S. Ct. 2138, 2142, 65 L. Ed. 2d 106] [restrictive zoning ordinances "benefit the [property owners] as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas"].) Thus, the necessary reciprocity of advantage lies not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good.

(9) The federal and state takings clauses, to be sure, place a limit, imprecise as it may be, on the regulatory burdens an individual property owner may be made to bear for public purposes. The breadth or narrowness of the class burdened by the regulation, the extent to which a regulation defeats the owner's reasonable investment-backed expectations, and the extent to which the affected property is also benefitted by the regulation are certainly pertinent to whether a regulation works a taking. (*Agins v. Tiburon*, *supra*, 447 U.S. at p. 262

[100 S. Ct. at p. 2142]; *Penn Central*, *supra*, 438 U.S. at pp. 124, 132 [98 S. Ct. at pp. 2659, 2663].) **(8b)** But the HCO neither targets an arbitrary small group of property owners, nor deprives all the burdened properties of so much of their value, without any corresponding benefit, as to constitute a taking on its face. As discussed earlier, the HCO affects *all* the approximately 500 residential hotels in San Francisco, comparable to the "over 400" New York City landmarks the United States Supreme Court relied upon in holding that landmark laws could not be characterized as "discriminatory, or 'reverse spot,' zoning." (*Penn Central*, *supra*, at p. 132 [98 S. Ct. at p. 2663].) Also like the landmarks law upheld in *Penn Central*, the HCO allows the property owner to continue the property's preordinance use unhindered; like the landmarks law, therefore, the HCO "does not interfere with what must be regarded as [the property owner's] primary expectation concerning the use of the parcel." (*Id.* at p. 136 [98 S. Ct. at p. 2665].) Finally, the chief purpose of the HCO, ensuring affordable and available housing for those San Franciscans who would otherwise be without it, carries benefits for all the City's property owners, including those operating tourist hotels. (*See id.* at pp. 134-135 [98 S. Ct. at pp. 2664-2665] [landmarks law benefits all New Yorkers].) We cannot agree with the dissent that a law applying on equal terms to all properties in a sizeable class defined by use, designed to benefit the City as a whole, and merely prohibiting a change of use from residential to commercial unless the owner mitigates the detrimental impact of that change, constitutes a facial taking of property.

The above may help to explain why the dissent's hypothetical concerning governmental appropriation of an automobile is inapposite. A law arbitrarily selecting a private automobile owner to dedicate his or her car to public use or pay for the government to buy another one would, as the

dissent suggests (dis. opn., *post*, at p. 693) clearly require compensation. Less clear, but more like the present case, would be a law requiring all common carriers to take certain mitigation measures before converting from passenger to freight service. A burden placed broadly and nondiscriminatorily on changes in property's use is not the equivalent of an arbitrary decision to hold an individual's property for ransom. As elsewhere in takings law, the answers are found not in absolute rules for all cases, but by the particularized weighing of public and private interests. (*Agins v. Tiburon*, *supra*, 447 U.S. at pp. 260-261 [100 S. Ct. at pp. 2141-2142].)

Finally, the dissent insists that owners of residential hotels cannot be required to continue the use of their property as low-income housing, or to mitigate the impact of ending that use, because they "did not cause poverty in San Francisco." (Dis. opn., *post*, at pp. 692-693.) But, of course, the owners of undeveloped property in *Agins v. Tiburon*, *supra*, 447 U.S. 255, restricted by zoning in how intensely they could develop the property, had not (yet) caused "the ill effects of urbanization" (*id.* at p. 261 [100 S. Ct. at p. 2142]) the zoning law was designed to protect against, and the owners of New York City's Grand Central Terminal had not (yet) caused the loss of historic structures that motivated that city's landmarks law (*Penn Central*, *supra*, 438 U.S. at p. 107 [98 S. Ct. at pp. 2650-2651]). Here, as in those cases, it is the detrimental effects of a *change* in the use of property that motivates the regulation. A use not in itself noxious or harmful, such as the operation of a tourist hotel, may nonetheless call for mitigation when the change of property to that use results in the loss of an existing use of public importance. (*See id.* at p. 134, fn. 30 [98 S. Ct. at p. 2664] ["Nor . . . can it be asserted that the destruction or fundamental alteration of a historic landmark is not

harmful"].)

If, as Justice Holmes warned, the Constitution "does not enact Mr. Herbert Spencer's Social Statics" (*Lochner v. New York* (1905) 198 U.S. 45, 75 [25 S. Ct. 539, 546, 49 L. Ed. 937] (dis. opn. of Holmes, J.)), it just as surely does not enact the late Robert Nozick's "Minimal State." (See Nozick, Anarchy, State and Utopia (1974) pp. ix, 171-172, 272-274.) However strongly and sincerely the dissenting justice may believe that government should regulate property only through rules that the affected owners would agree indirectly enhance the value of their properties (dis. opn., *post*, at pp. 700-701), nothing in the law of takings would justify an appointed judiciary in imposing that, or any other, personal theory of political economy on the people of a democratic state.

(10) Turning to the as-applied challenge, plaintiffs argue "[t]he $567,000 fee imposed by the Hotel Ordinance has no connection at all to the Field Brothers' tourist use of the San Remo Hotel" because (quoting the Court of Appeal) the permit simply "'allow[ed] an existing use to continue.'" As explained above, however, the mitigation fee was based on the number of units designated residential that were proposed for conversion, and the residential designation of the San Remo Hotel's rooms was reasonably based on the hotel management's own report of the rooms' use on the HCO's initial status date of September 23, 1979.[17] Plaintiffs'

[17] Plaintiffs assert they were unaware of the 1981 survey that established the hotel's initial status, and did not know of the hotel's classification until 1983. No facts alleged in their complaint, however, would show that they were prevented by City action from learning of and participating in the survey and certification process. Under the HCO, the City-issued certificate of use, from which plaintiffs could have appealed, was required to be posted in the

operative complaint, moreover, contains no allegations specifically relating to the San Remo Hotel's use as of the initial status date. The only use allegation covering that date is a general assertion that the hotel has been "primarily" used by "transient and tourist" guests since 1916. Nowhere do plaintiffs allege that the San Remo Hotel was, in 1979 or at any time, *entirely* in tourist use, as would be required to support their claim that the housing replacement fee has "no connection at all" to the hotel's historical use. (As discussed earlier, the administrative record indicates that plaintiffs could not truthfully so allege, since it shows mixed tourist and residential use throughout the 1980's.) The complaint, therefore, fails to state a cause of action on the ground that the amount of the fee paid by plaintiffs bore no reasonable relationship to the impacts of their proposed conversion to tourist use.

Plaintiffs further argue that, because the conditional use permit granted them by the City Planning Commission contained a condition requiring them to offer lifetime leases to existing residential tenants, no housing was lost by conversion to tourist use. Plaintiffs' conclusion, however, does not follow from their premise. The HCO seeks to preserve the *supply* of affordable housing units, not merely to extend the tenancy of any individual resident. (HCO, § 41.2.) Rooms designated residential under the ordinance that were vacant or temporarily rented to tourists at the time of

hotel lobby when issued in 1981. (HCO, § 41.6(d).) Even when they took possession in 1983, moreover, plaintiffs made no effort to correct the allegedly incorrect designation, waiting until 1987 even to draw it to the City's attention by letter. In any event, plaintiffs do not contend the HCO's survey and classification procedures deprived them of procedural due process, and we express no opinion in that regard.

conversion were nonetheless housing units that would be lost in the conversion, since after conversion they would no longer be held available, by law, for residential tenants. The same is true of rooms occupied by residential tenants who declined the offered leases. Even as to any rooms for which lifetime leases were accepted, the residential designation to be lost by conversion would have preserved the residential availability of those units after the lessees moved or passed away. Accordingly, even if no current resident were required to move, the City could reasonably base the in lieu fee on the number of units designated and reserved for residential use that would be made unavailable by the plaintiffs' proposed conversion of all of the hotel's rooms to tourist use.

Finally, plaintiffs, citing *Ehrlich*, *supra*, 12 Cal. 4th at page 883, contend that the size of a development mitigation fee may not constitutionally be based on the loss of the property's prior use. In *Ehrlich*, of course, the court examined the recreational facilities fee under the "rough proportionality" standard (*id.* at p. 882), a type of scrutiny inapplicable here. Perhaps more significantly, the fee in *Ehrlich* was imposed as a condition of a requested change in zoning for the subject property; there was no existing recreational use, the club having already been closed as uneconomical and its facilities demolished. (*Id.* at pp. 861-862.) The particular recreational facilities previously existing on the property having been permissibly demolished, the city could not use the value of their loss to impose a mitigation fee for the *change in zoning* sought by the property owner, although the majority held the fee *could* be based on the costs of planning and rezoning other properties for the needed recreational use. (*Id.* at pp. 883-884 (plur. opn. of Arabian, J.); *id.* at p. 902 (conc. opn. of Mosk, J.).) In the present case, the housing that was to be lost by conversion of rooms from residential to tourist use had *not* been abandoned or

demolished; nor had plaintiffs invoked their statutory right (Gov. Code, § 7060) to withdraw residential accommodations from the market. Plaintiffs sought not merely a change in the zoning affecting the site of the San Remo Hotel, but permission to change the use of existing residential facilities on the property. A mitigation fee measured by the resulting loss of housing units was thus reasonably related to the impacts of plaintiffs' proposed change in use.

DISPOSITION

The judgment of the Court of Appeal is reversed insofar as it reversed the superior court's judgment for defendant on plaintiffs' complaint. In all other respects the judgment of the Court of Appeal is affirmed.

DISSENT

BAXTER, J., Concurring and Dissenting.

I concur in the majority opinion insofar as it finds the Court of Appeal erred in assessing plaintiffs' as-applied challenge to the City and County of San Francisco's (City) housing replacement fee under a standard of heightened scrutiny. I also agree with much of what the majority says about the test that does apply to this exaction. My objections are that in the remainder of its analysis, the majority fails to decide the issues on which we granted review and strains to reach questions that are not fairly included in the review petition.

I ask different questions and, not surprisingly, come up with different answers. Unlike the majority, I would affirm the Court of Appeal to the extent that it remanded for further proceedings concerning the petition for writ of administrative

mandate and would remand for further proceedings under the correct takings standard.

I

The majority frames the first question as whether the City properly required plaintiffs to obtain a conditional use permit for full tourist use of the hotel. The problem with this formulation is that it treats the issue of the conditional use permit as an all-or-none proposition. This is a mistake. The critical issue is not *whether* plaintiffs needed to obtain a conditional use permit if they wished to rent all of the hotel's rooms to tourists--as the majority notes, there is evidence in the record to support the finding that *some* rooms had historically been rented to long-term residents (maj. opn., *ante*, at pp. 659, 663)--but *how many* rooms required a permit before plaintiffs could rent them to tourists. To answer *that* question, it is necessary first to determine how many tourist rooms are grandfathered as a permitted conditional use.

As the City points out, the process of converting residential hotel rooms to tourist hotel rooms requires two separate permits: a conversion permit from the City Department of Building Inspection under the Residential Hotel Unit Conversion and Demolition Ordinance (HCO), and a conditional use permit from the City Planning Commission under the City Planning Code. Plaintiffs do not independently challenge here the requirement of obtaining a conversion permit from the Department of Building Inspection, merely the need to obtain a conditional use permit from the Planning Commission.

The parties agree that no duty exists to obtain a conditional use permit to continue a property use that qualifies

as a permitted conditional use.[1] A permitted conditional use is one that "existed lawfully at the time a new zoning prohibition or restriction came into force" and "is conditionally *permitted* by the new zoning law." (Maj. opn., *ante*, at p. 661, fn. 10.) Thus, a permitted conditional use in the North Beach neighborhood commercial district must have "lawfully existed" on the effective date of the 1987 ordinance. (*Id.* at pp. 658-659, citing S.F. Planning Code, § 179, subd. (a)(2).) It was on this ground that plaintiffs disputed the need for a conditional use permit. (See maj. opn., *ante*, at p. 653.)[2]

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[1] It follows that no conversion permit would be needed to continue a permitted conditional use, either. Yet, under the result endorsed by the majority, property owners who wish to convert only one residential room to tourist use must also convert all remaining rooms in the building—even rooms grandfathered as a permitted conditional tourist use—and satisfy the one-for-one replacement requirement for *all* the rooms. Remarkably, the majority makes no effort to justify such a condition under the takings test the court has adopted.

[2] The majority purports to find it significant that the conditional use permit did not "specify the number of rooms subject to one-to-one replacement under the HCO, calculate the in lieu replacement fee to be assessed, or impose any other condition dependent on the number of rooms previously in tourist use." (Maj. opn., *ante*, at p. 662.) Plaintiffs' challenge, however, is not to the contents of the permit, but to the administrative decision that *preceded* issuance of the permit, in which the City refused to grandfather any prior tourist use of the hotel as a permitted conditional use. (*See id.* at p. 653.) Although plaintiffs thereafter applied for a conditional use permit for *all* their hotel rooms, they did so, as the City Planning Commission noted, "under protest" and without waiving their claim that the majority of the rooms should have been grandfathered as a permitted conditional tourist use.

The City asserts that *no* tourist rental could have "lawfully" existed in the district because of the legal restrictions on tourist rental imposed by the HCO, which was enacted in 1981 and amended in 1990. The City, however, has been unable to explain why the HCO, which is part of the San Francisco *Administrative* Code, should have been considered by the City Planning Commission in determining whether tourist rental "lawfully existed" under section 179, subdivision (a)(2) of the San Francisco *Planning* Code, where the zoning ordinances are found. Indeed, the City's statements throughout these proceedings preclude any attempt to cut and paste the HCO into the Planning Code.

As the City repeatedly asserts, the HCO is "separate" from the City Planning Code and, in particular, did not change the zoning classification of the San Remo Hotel under the City Planning Code. The City likewise concedes that "[n]either the Planning Commission nor the Zoning Administrator has responsibility for administering the HCO." The HCO is administered instead by the City Department of Building Inspection.

These concessions are consistent with an opinion letter by the city attorney issued contemporaneously with the enactment of the HCO in 1981. In that letter, the city attorney stated that

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Were plaintiffs on remand to establish the truth of their allegation that at least 53 of their 62 rooms should be grandfathered as a permitted conditional tourist use, it is certainly plausible that they would not undertake the permitting process for the remaining handful of rooms. Without a remand, however, the majority has approved a procedure in which plaintiffs, no matter the number of rooms sought to be converted, are obligated to pay $ 567,000. It is difficult to imagine how such a scheme satisfies even the most lax of constitutional tests.

the HCO was not a zoning law, that the City Planning Code "makes no distinction between the use of a hotel devoted to permanent residents or to tourists," that the adoption of the HCO "does not render an existing structure or use a non-conforming structure or use," and that whether a tourist use may continue as a permitted conditional use is governed by the applicable sections of the *Planning* Code. (S.F. City Atty., Opn. No. 81-54 (Sept. 14, 1981) pp. 7-8; see maj. opn., *ante*, at p. 660.)

The city attorney's opinion letter, together with the City's concessions, undercut the City's efforts here to claim that the HCO was a critical component of the determination whether tourist use *lawfully* existed as a permitted conditional use under the City Planning Code. Indeed, the zoning administrator was apparently so uncomfortable with the City's belated change of heart that he declined to accept the City's newly minted position and found instead that "[i]t has been the Department of City Planning's ('Department') *administrative practice* to classify residential hotels designated under the Hotel Ordinance as residential uses under the Planning Code." (Italics added.) But "administrative practice" is merely a convenience; it does not aid in determining whether a prior use was lawful or unlawful. The body of law relevant to that determination—i.e., the Planning Code—did not distinguish between tourist hotels and residential hotels and therefore did not prohibit tourist rentals at the San Remo.[3]

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[3] The majority's resolution of this hotly disputed issue is, to put it charitably, unclear. The majority begins by declining to wade into the fray, insisting that it is unnecessary to resolve whether the City Planning Commission properly considered the HCO to be a legal restriction on tourist use of the hotel since "the critical issue in this case is *not the lawfulness* of the historical tourist use, *but its extent*." (Maj. opn., *ante*, at p. 660.) Later on, however, the

The superior court, on this same record, impliedly rejected the zoning administrator's restrained construction and found instead that "[s]ince the issuance of the Certificate of Use in 1981, residential use of the San Remo Hotel was the only lawful use." The majority holds—and I agree—that the superior court erred. (Maj. opn., *ante*, at p. 660.) But the majority declines to issue the administrative writ on the separate ground that plaintiffs' proposal to rent all of the rooms to tourists is "a significant alteration or enlargement of the historical lawful use" and therefore required a new conditional use permit. (*Ibid.*) I agree that a conditional use permit is required to the extent plaintiffs wish to alter or enlarge the historical lawful use. I disagree strongly, however, with the majority's unstated and unproven assumption that this encompasses *all* of the San Remo's rooms. The majority has simply terminated its analysis prematurely.

Nothing in the record supports the majority's implied finding that none of the rooms could be grandfathered as a permitted conditional tourist use. Indeed, neither the zoning

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majority appears to leave the sidelines and adopt the City's newly minted position, rejecting plaintiffs' effort to have prior tourist use grandfathered as a permitted conditional use "because plaintiffs' tourist use of the hotel was, as required under the HCO, *temporary* and *subject to preemption by residential demand*." (Maj. opn., *ante*, at p. 662.) If the latter statement represents the majority's true views, the majority ought in all fairness explain why the city attorney, the zoning administrator, and the Court of Appeal (*see Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal. App. 3d 892, 902 [223 Cal. Rptr. 379] [HCO "does not regulate land use in the same manner as zoning laws"]) all are wrong about the role of the HCO in determining whether a permitted conditional use has been established.

administrator nor the superior court bothered to determine how many rooms might have been used historically as tourist rooms because of their erroneous belief that the HCO barred *any* tourist use from qualifying as a lawful permitted conditional use. (*See* maj. opn., *ante*, at p. 658.) Similarly, the Board of Permit Appeals, in affirming the zoning administrator, apparently found it sufficient that the San Remo was a residential hotel "at least in part."

The majority's reliance on the unproven assumption that no rooms could be grandfathered as a permitted conditional use is all the more puzzling given that the opinion elsewhere is quite cognizant of the prospect that some rooms in the same building may be subject to differing classifications. As the majority explains, we must "consider separately each use in a multiple-use structure," such as the San Remo, in classifying uses "for purposes of neighborhood commercial district zoning." (Maj. opn., *ante*, at p. 662, citing S.F. Planning Code, § 703.2, subd. (b)(1).)[4] The majority also recognizes that "[t]he administrative record shows that both residential and tourist rentals were significant uses of the San Remo Hotel at the relevant times. " (Maj. opn., *ante*, at p. 659.) Accordingly (and as the majority acknowledges), tourist use at the San Remo would qualify as a permitted conditional

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[4] I do not assume, as the majority suggests, "that conditional use permits are issued on a room-by-room basis." (Maj. opn., *ante*, at p. 662.) I do, however, agree with the quotation in the text from the majority that, in classifying uses for zoning purposes, we must consider separately each use in a multiple-use structure. The *need* for a conditional use permit, in other words, is determined on a room-by-room basis--as the majority acknowledges. (See maj. opn., *ante*, at p. 660 [affirming the need for a conditional use permit "[e]ven as to those rooms that had, on occasion, been lawfully rented to tourists . . . ."].)

use—and is grandfathered under the Planning Code—"*to the extent it lawfully existed when the current laws' restrictions came into effect, but does not qualify to the extent plaintiffs propose to significantly alter or expand it.*" (*Id.* at p. 662, italics added.)

The majority thus appears to recognize not only that the critical question here is the number of tourist rooms that should be grandfathered as a permitted conditional use, but also that the current record is inadequate to ascertain that number. For example, the zoning administrator described the annual unit usage reports from 1982 to 1992 as showing residents occupying between 25 and 57 of the designated residential units. "Even if only the 25-57 units actually shown to be occupied by residents were designated as residential units," the zoning administrator explained, "[plaintiffs] would still be required to procure a conditional use permit to convert *them* under the terms of Planning Code section 178(c)." (Italics added.) Yet, as the majority recognizes, the number of eligible rooms "during the relevant period" is "not clearly answered" by the zoning administrator's aggregation of usage reports over a 10-year period. (Maj. opn., *ante*, at p. 661.) Plaintiffs, for their part, offered evidence that no more than 10 to 20 percent of the hotel's room had been rented to long-term residents, which would fix the number of rooms to be converted well below the number suggested by the zoning administrator. In their complaint, they allege that no more than nine rooms should have been deemed residential.

As interesting as this dispute may be, it is beyond cavil that the current record is insufficient to resolve how many tourist rooms might be grandfathered as a permitted conditional use. Under the circumstances, a remand is appropriate to enable factual findings to be made regarding

the actual use of the hotel during the relevant period.[5] On remand, the City would also be free to argue that plaintiffs had discontinued or abandoned any permitted conditional tourist use they are able to establish. "'[A]bandonment of a nonconforming use ordinarily depends upon a concurrence of two factors: (1) An intention to abandon; and (2) an overt act, or failure to act, which carries the implication the owner does not claim or retain any interest in the right to the nonconforming use (8A McQuillin, [Municipal Corporations (3d ed. 1994)], § 25.192; 1 Anderson, American Law of Zoning, § 6.58). Mere cessation of use does not of itself amount to abandonment although the duration of nonuse may be a factor in determining whether the nonconforming use has been abandoned (101 C.J.S. Zoning § 199).'" (*Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal. 4th 533, 569 [48 Cal. Rptr. 2d 778, 907 P.2d 1324]; *see* S.F. Planning Code, § 178, subd. (d) [permitted conditional uses deemed abandoned if discontinued for three years]; S.F. Admin. Code, § 41.19 (a)(1) [a tourist unit may be rented to a permanent resident without changing the legal status of the unit]; *cf. Tenderloin Housing Clinic, Inc. v. Astoria Hotel, Inc.* (2000) 83 Cal. App. 4th 139, 144-145 [98 Cal. Rptr. 2d

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[5] It is unclear whether the critical date is in 1987, when the neighborhood commercial district ordinance took effect, or in 1982, when interim measures first took effect (and before plaintiffs resumed operation of the hotel), or some date in between. (*See* maj. opn., *ante*, at p. 659.) Because the selection of the appropriate effective date may depend in part on the evidence adduced by plaintiffs demonstrating an existing tourist use, it would be premature to resolve the issue here. Inasmuch as the parties agree that the relevant effective date lies somewhere between 1982 and 1987, the purpose of the majority's discussion of usage rates between 1988 and 1991 (*see* maj. opn., *ante*, at pp. 654-655, 659-660) is lost on me.

924].) The current record, however, renders it impossible to determine which rooms, if any, could be rented to tourists as a permitted conditional use and which rooms, if any, have abandoned or discontinued that permitted conditional use. How the majority, which is plainly aware of the significance of the hotel's historical use and the inadequacy of the record on that point, can do anything other than order a remand is a mystery.

In sum, the answer to the question framed by the majority—"Did San Francisco Properly Require Plaintiffs to Obtain a Conditional Use Permit for Full Tourist Use of the Hotel?"--is a *conditional* yes. The need to obtain a permit exists only for those rooms for which plaintiffs cannot establish tourist rental as a permitted conditional use, which is precisely the issue left unresolved by the majority. In my view, the writ petition should be granted in part and the matter remanded to permit the superior court or the appropriate administrative agency to take evidence concerning actual tourist use and to resolve any claims that tourist use was abandoned or discontinued. The majority's abrupt termination of the litigation grants the City a windfall housing replacement fee for each room that further proceedings would have revealed to be grandfathered as a permitted conditional tourist use.

II

I agree with the majority that in-lieu fees assessed under the HCO are not subject to the "rough proportionality" test articulated in *Dolan v. City of Tigard* (1994) 512 U.S. 374 [114 S. Ct. 2309, 129 L. Ed. 2d 304] (*Dolan*). *Dolan* envisioned that some "land use regulations" would not be subject to the "rough proportionality" test. (*Id.* at p. 385 [114 S. Ct. at pp. 2316-2317].) To identify which land use

regulations would be subject to the more stringent test, the court relied on two "relevant" DISTINCTIONS: between "an *adjudicative* decision to condition the [owner's] application for a building permit on an individual parcel" and "essentially *legislative* determinations classifying entire areas of the city," and between "a requirement that [the owner] *deed* portions of the property to the city" and "a *limitation* on the use [the owner] might make of her own parcel." (*Ibid.*, italics added.)

In *Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854 [50 Cal. Rptr. 2d 242, 911 P.2d 429], this court unanimously concluded that the "rough proportionality" test applied when "special, discretionary permit conditions on development by individual property owners" (*id.* at p. 881 (plur. opn. of Arabian, J.); *id.* at p. 912 (conc. & dis. opn. of Werdegar, J.)) were "adjudicatively imposed" (*id.* at p. 906 (conc. & dis. opn. of Kennard, J.); *id.* at p. 891 (conc. opn. of Mosk, J.)). Here, as the majority notes, the in-lieu fee is a product of "generally applicable legislation" (maj. opn., *ante*, at p. 669) and its calculation is subject to "no meaningful government discretion." (*Ibid.*) Under those circumstances, the in-lieu fee here must be viewed as one of those land use regulations that is not subject to the "rough proportionality" test.

This much is sufficient to answer "no" to the main question the City presented in its review petition: "Where a legislatively adopted impact fee applies equally to 500 residential hotels and 18,000 residential hotel units, is it nevertheless a 'particularized' exaction subject to 'heightened scrutiny' because it does not apply to every property in the city?" Although the majority might have stopped the takings analysis at that point, it seems prudent to me to discuss, as the majority does, the legal standard that *does* apply to the in-lieu fee here, namely that "[a] land use regulation does not effect

a taking if it 'substantially advances legitimate state interests' . . . ." (*Dolan*, *supra*, 512 U.S. at p. 385 [114 S. Ct. at p. 2316].)

Admittedly, this test is not easy of application. The Supreme Court acknowledges that it has not provided "a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests" (*Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999) 526 U.S. 687, 704 [119 S. Ct. 1624, 1636, 143 L. Ed. 2d 882] other than to distinguish this requirement from that used by the high court in due process and equal protection claims. (*See ibid.*, citing *Nollan v. California Coastal Comm'n* (1986) 483 U.S. 825, 834-835, fn. 3 [107 S. Ct. 3141, 3147, 97 L. Ed. 2d 677].) As *Nollan* stated in that footnote, "our opinions do not establish that these standards are the same as those applied to due process or equal protection claims." (*Nollan*, *supra*, 483 U.S. at pp. 834-835, fn. 3 [107 S. Ct. at p. 3147].) Rather, takings jurisprudence has diverged from due process and equal protection both in "verbal formulations" and in application. (*Ibid.*) "[T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical." (*Ibid.*; *see generally Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal. 4th 952, 1018-1021 [81 Cal. Rptr. 2d 93, 968 P.2d 993] (dis. opn. of Chin, J.) (*Santa Monica Beach*).)

Thus, to the extent that the majority suggests that the property owner must prove the land use regulation is arbitrary to prevail on a *takings* claim as opposed to a *due process* claim (*see* maj. opn., *ante*, at p. 674, fn. 16, quoting *Dolan*, *supra*, 512 U.S. at p. 391, fn. 8 [114 S. Ct. at p. 2320]), it

is not faithful to the distinction the high court has drawn between those two legal doctrines.[6] For the most part, however, the majority takes pains to distinguish the requirement under the takings clause that a land use regulation "substantially advance[] legitimate state interests" from the requirement of due process and equal protection that a regulation be "not arbitrary." To pass scrutiny under the takings clause, the majority says that in-lieu fees "must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development," although "the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees," which are subject to the "rough proportionality" test. (Maj. opn., *ante*, at p. 671.) Although this formulation makes plain that something more is required than mere rational-basis review, its meaning is still opaque. The defect, I submit, is that the majority's test is too much defined by what it is *not*, rather than by what it *is*. For the courts who will be called upon to apply this standard, we must be more illuminating.

The majority's formulation correctly describes the *subjects* of the inquiry—i.e., the governmental regulation and the public impact of the development—as well as the *intensity* of the relationship between them—i.e., a reasonable relationship. What is missing is a description of the *nature* of the relationship between the public impact of the development and the governmental regulation. On this point, I find helpful the concurring and dissenting opinion in *Pennell v. San Jose* (1988) 485 U.S. 1, 15-24 [108 S. Ct. 849, 859-864, 99 L.

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[6] Justice Chin cogently explained the meaning of *Dolan's* footnote 8 in his dissenting opinion in *Santa Monica Beach*, *supra*, 19 Cal. 4th at pages 1020 through 1021.

Ed. 2d 1] (conc. & dis. opn. of Scalia, J.). *Pennell* involved the kind of land use regulation that, like the in-lieu fees here, is not subject to the "rough proportionality" test. (See *Santa Monica Beach*, *supra*, 19 Cal. 4th at p. 968.) Justice Scalia, joined by Justice O'Connor, observed that "[t]raditional land use regulation (short of that which totally destroys the economic value of property) does not violate this [takings clause] principle because there is a *cause-and-effect* relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly." (*Pennell v. San Jose*, *supra*, 485 U.S. at p. 20 [108 S. Ct. at p. 862], italics added.)

From Justice Scalia's separate opinion, it is apparent that the missing element in the majority's formulation is the *causal* connection between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Thus, I would reformulate the standard as follows: The in-lieu fee does not violate the takings clause so long as (1) there is a cause-and-effect relationship between the owner's desired use of the property and the social evil that the fee seeks to remedy, and (2) the fee is reasonably related in both intended use and amount to that social evil. This two-part standard best implements the high court's broadly stated requirement that the fee substantially advance legitimate state interests.

III

The majority, after announcing the correct standard, strays beyond the questions presented and applies the standard to *some* of the claims in plaintiffs' complaint and then,

without any additional discussion, dismisses the remaining claims by affirming the trial court's judgment sustaining the demurrer. I would refrain from reaching the merits of these selected takings claims and, without analysis or even an acknowledgement of doing so, from summarily denying the others. Well-settled principles of appellate review counsel us to remand the matter to the lower courts to apply the correct legal standard in the first instance.

The most immediate reason for remanding to the lower courts, of course, is that we already need to remand for further factual findings to determine the number of rooms that require further permitting before they may be offered to tourists. When that is completed, plaintiffs will need to choose anew whether and, if so, how to satisfy the housing replacement requirement, "whether by constructing or bringing onto the market new units; by sponsoring such construction by a public or nonprofit private housing developer; or by paying, in lieu of such construction, a fee to a designated City housing fund." (Maj. opn., *ante*, at p. 668.) Should plaintiffs choose again to pay the in-lieu fee, the appropriate City agency will need to recalculate it, taking into account the correct number of units and their replacement cost. (*See ibid.*) Only if plaintiffs then challenge the fee imposed will we be presented with an actual case or controversy that resembles the one the majority addresses here.

Even if we were not already remanding for further factual development involving the petition for writ of administrative mandate, a remand to permit the Court of Appeal to apply the correct legal standard to plaintiffs' claims would be the prudent course. The majority finds, and I agree, that the Court of Appeal erred in analyzing plaintiffs' as-applied takings challenge under a heightened scrutiny standard. (Maj.

opn., *ante*, at pp. 668, 670.) It is our practice, where a lower court has applied an incorrect legal standard, to remand for application of the correct standard, even when a remand is not required for other reasons. (*E.g.*, *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 15 [78 Cal. Rptr. 2d 1, 960 P.2d 1031] [where the Court of Appeal applied an erroneous standard, "regard for the structure of appellate decisionmaking suggests that the case should be returned to the Court of Appeal"]; *id.* at p. 25 (conc. opn. of Mosk, J., joined by George, C. J. and Werdegar, J.) ["It is therefore appropriate to remand to the Court of Appeal for reconsideration in light of the proper standard of review"]; see also *People v. Cox* (2000) 23 Cal. 4th 665, 677-678 & fn. 7 [97 Cal. Rptr. 2d 647, 2 P.3d 1189]; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal. 4th 785, 803 [85 Cal. Rptr. 2d 844, 978 P.2d 2]; *People v. Breverman* (1998) 19 Cal. 4th 142, 164, 178-179 [77 Cal. Rptr. 2d 870, 960 P.2d 1094]; *People v. Cahill* (1993) 5 Cal. 4th 478, 510 [20 Cal. Rptr. 2d 582, 853 P.2d 1037].) There is no reason to deviate from our practice in this case. Indeed, the justifications for adhering to our traditional practice are numerous and compelling.

First, no hardship exists to warrant our extraordinary intervention to bring an abrupt close to the litigation. Plaintiffs have done everything the City has ordered them to do: they have secured the permits to rent to tourists and have paid the $567,000 housing replacement fee. The only issue in the litigation, as conceded by the City at oral argument, is whether plaintiffs will get some or all of their money back--and the majority's approach plainly does not aid plaintiffs. Moreover, the majority should not be under any illusion that sustaining the demurrer will bring an end to a decade of litigation over that issue. Plaintiffs have reserved their federal claims and, if rebuffed here, will resume their federal litigation, which is now subject to *Pullman* abstention. (*See*

The San Remo Hotel v. City and County of San Francisco (9th Cir. 1998) 145 F.3d 1095, 1106 & fn. 7.)

Second, remand would give us, a *reviewing* court, the benefit of a reasoned decision applying the correct standard to the merits of plaintiffs' claims. The Court of Appeal *declined to address* plaintiffs' facial challenge on the grounds that plaintiffs "failed to seek leave of court to replead such causes of action" and that "the present state of the pleadings is insufficient to allow us to fully assess the ultimate legal validity of the facial constitutionality of the HCO." The trial court did purport to reach the merits, but relied solely on *Terminal Plaza Corp. v. City and County of San Francisco*, *supra*, 177 Cal. App. 3d 892, and *Bullock v. City and County of San Francisco* (1990) 221 Cal. App. 3d 1072 [271 Cal. Rptr. 44]. Yet, neither *Terminal Plaza* nor *Bullock* addresses the "substantially advance" branch of takings analysis. As for the as-applied challenges, the Court of Appeal applied the wrong standard, and the trial court failed to reach the merits of these claims at all, choosing instead to reject the claims categorically on the authority of *Pfeiffer v. City of La Mesa* (1977) 69 Cal. App. 3d 74 [137 Cal. Rptr. 804]. The Court of Appeal held *Pfeiffer* inapplicable for several reasons, none of which the City challenges here. (See maj. opn., *ante*, at p. 658, fn. 9.) In sum, only one category of claims has even been addressed on the merits by a lower court--the as-applied claims by the Court of Appeal--and that court applied what we have now determined to be the wrong standard. I do not view these circumstances as crying out for us to deviate from our practice of remanding to permit the lower courts to apply the correct standard in the first instance.

Third, remand for application of the correct standard would be consistent with the way the parties have framed the issues and the relief the City has sought here. The questions

presented in the City's petition for review do not invite us to resolve the merits of plaintiffs' claims. Indeed, when asked at oral argument what this court should do if it adopts (as it has) a standard not urged by either party,[7] the City's counsel replied, "I assume the court would remand for a consideration by the trial court of what standard of review the court would order to be applied."

Fourth, remand is appropriate to permit the lower courts to address the claims articulated in the complaint that are *not* discussed by the majority. The majority purports to affirm the trial court's judgment sustaining the demurrer to the entire complaint, yet limits its discussion only to a few facial and as-applied challenges to the HCO. Our task on demurrer is to determine whether "the complaint states a cause of action under *any* theory, regardless of the title under which the factual basis for relief is stated." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal. 4th 26, 38 [77 Cal. Rptr. 2d 709, 960 P.2d 513].) Viewed in this light, it is apparent that this complaint articulates a number of potential takings and other claims, none of which has yet been addressed by the majority or rejected by the Court of Appeal, including (1) that the lifetime leases effect a physical taking (*see Yee v. Escondido* (1992) 503 U.S. 519, 528 [112 S. Ct. 1522, 1529, 118 L. Ed. 2d 153] ["A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy"]);[8] (2) that the HCO

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[7] The City misperceives the applicable standard to be "akin to the rational basis test."

[8] The Court of Appeal found that plaintiffs had properly alleged a physical taking in the complaint. The City disagrees, and urges us to reverse the Court of Appeal. On this, as with the

and fee deprived plaintiffs of their reasonable investment-backed expectations; (3) that the HCO denies plaintiffs all economically viable use of the property, inasmuch as a surplus of vacant residential hotel rooms already exists in San Francisco;[9] and (4) that state law preempted the HCO.[10]

I can think of no reason for the majority's failure to address these claims, other than the fact that none of them can even remotely be shoehorned into the issues presented by the

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remaining causes of action in the complaint, the majority is silent.

[9] The federal court deemed this claim unripe because state remedies for inverse condemnation on this claim were available. (*The San Remo Hotel v. City and County of San Francisco, supra*, 145 F.3d at pp. 1101-1102.) The majority's decision to affirm the judgment sustaining the demurrer without even mentioning this claim casts grave doubt on the correctness of the federal court's understanding of state remedies--and thus will have repercussions on ripeness far beyond this case.

[10] Since the Court of Appeal, having ordered a remand to permit plaintiffs to prove up a legal nonconforming use, found it unnecessary to reach the preemption claim, it is not surprising that plaintiffs did not use their answer to the review petition to seek our review of this issue--or of the other unrelated issues that had not yet been resolved in the litigation. What *is* surprising is the majority's rush to have this court, in the first instance, opine on a number of constitutional issues in this difficult area of law despite the existence of an unaddressed, nonconstitutional basis for decision. The majority's eagerness to discard cherished views of judicial restraint (*see, e.g., People v. Hernandez* (1998) 19 Cal. 4th 835, 843 [80 Cal. Rptr. 2d 754, 968 P.2d 465] (conc. opn. of Werdegar, J.); *People v. Bennett* (1998) 17 Cal. 4th 373, 393 [70 Cal. Rptr. 2d 850, 949 P.2d 947] (conc. opn. of Werdegar, J.)) merely to facilitate an abrupt and unsolicited termination of this litigation in the City's favor is puzzling.

City's petition. But the City's decision to limit issues for review can hardly be deemed a license for us to dismiss plaintiffs' entire complaint without comment, especially where viable issues remain. To affirm the demurrer here would punish plaintiffs for complying with rule 29.3(c) of the California Rules of Court, which tells the parties that "[u]nless otherwise ordered, briefs on the merits shall be confined to those issues, and issues fairly included in them." The lesson here, if there is one, is that litigants in this court should be careful to brief against any conceivable contingency that could jeopardize any favorable ruling below, even if the arguments fall well outside the questions presented. I confess I do not think this is a good idea.

IV

I would therefore affirm the judgment of the Court of Appeal to the extent that it ordered a remand for further proceedings relating to the petition for writ of administrative mandate and affirmed the imposition of nominal penalties under the City's cross-complaint. I would reverse the Court of Appeal to the extent that it applied a heightened-scrutiny standard to plaintiffs' taking claims and would then remand the cause to enable the Court of Appeal to apply the correct legal standard. To the extent the majority prevents plaintiffs from demonstrating their entitlement to writ relief, prematurely analyzes plaintiffs' as-applied takings claims, and summarily disposes of plaintiffs' other claims without any analysis whatsoever, I respectfully dissent.

Chin, J., concurred.

BROWN, J., Dissenting.

Americans are a diverse group of hard-working, confident, and creative people molded into a nation not by common ethnic identity, cultural legacy, or history; rather, Americans have been united by a dream—a dream of freedom, a vision of how free people might live. The dream has a history. The idea that property ownership is the essential prerequisite of liberty has long been "a fundamental tenet of Anglo-American constitutional thought." (Ely, The Guardian of Every Other Right (1998) p. 43.) "Indeed, the framers saw property ownership as a buffer protecting individuals from government coercion. Arbitrary redistribution of property destroyed liberty, and thus the framers hoped to restrain attacks on property rights." (*Ibid.*) "Property must be secured, or liberty cannot exist" (Adams, A Balanced Government (1790) in Discourses on Davila (1805), reprinted in 6 The Works of John Adams (1851 ed.) p. 280), because property and liberty are, upon examination, one and the same thing.

Private property is in essence a cluster of rights inuring to the benefit of the owner, freely exchangeable in accordance with the terms of private agreements, and recognized and protected by common consent. In the case of real property, this cluster of rights includes the right to exclude persons from certain physical space. In the case of intellectual property, it may include the right to employ a valuable method or process to the exclusion of others. In other words, private property represents zones of individual sovereignty—regions of autonomy within which we make our own choices.

But private property, already an endangered species in California, is now entirely extinct in San Francisco. The City and County of San Francisco has implemented a neo-feudal

regime where the nominal owner of property must use that property according to the preferences of the majorities that prevail in the political process—or, worse, the political powerbrokers who often control the government independently of majoritarian preferences. Thus, "the lamb [has been] committed to the custody of the wolf." (6 The Works of John Adams, *supra*, at p. 280.) San Francisco has redefined the American dream. Where once government was closely constrained to increase the freedom of individuals, now property ownership is closely constrained to increase the power of government. Where once government was a necessary evil because it protected private property, now private property is a necessary evil because it funds government programs.

I. *THE SAN FRANCISCO PLANNING COMMISSION'S ZONING DECISION RESTRICTING PLAINTIFFS' ABILITY TO CONVERT THEIR HOTEL TO TOURIST USE CONSTITUTES A TAKING REQUIRING COMPENSATION*

The City and County of San Francisco (the City), like other cities, seeks to provide affordable housing to its low-income residents. The most egalitarian way to achieve this goal would be to distribute the cost of subsidies as broadly as possible, but the forces attacking private property in California--though claiming the moral high ground--have proved themselves anything but egalitarian in their approach. In 1981, the City enacted the Residential Hotel Unit Conversion and Demolition Ordinance (S.F. Admin. Code, ch. 41) (the HCO; all citations to HCO are to chapter 41 of the San Francisco Administrative Code), the details of which are summarized in the majority opinion, *ante*, at pages 650 through 652. The HCO places the burden of providing low-income housing disproportionately on a relatively small group

of hotel owners. These hotel owners certainly did not cause poverty in San Francisco; indeed, for a long time they voluntarily helped relieve the problem by leasing some or all of their rooms on a long-term basis to low-income residents. But as the economy of the City shifted, this residential use of their hotel rooms became increasingly unprofitable, and hotel owners began to abandon the residential rental business. It was then that the City, facing constitutional constraints on taxation and other sources of revenue, began to see the hotel owners as the most convenient--if not the most equitable--off-budget solution to its housing problems. If the City were devising a tax that would subsidize low-cost housing, I strongly doubt it would limit its tax to the owners of a few hundred residence hotels, but in the often surreal world of political expedience, these ill-fated business people were ordered to use their property for the benefit of the poor, thereby greatly depressing the market value of that property.

The express purpose of the HCO was to preserve the City's stock of low-income residential housing by requiring hotel owners to continue leasing their rooms as residences, or to replace those residential units if they chose to convert the rooms to tourist use. (HCO, §§ 41.2, 41.3.) Obviously, the HCO is facially unconstitutional. If a person took my car and asked a ransom for its return, he or she would be guilty of theft. But what if the City, seeking to provide transportation to the poor, orders me to operate an informal carpool, or if I prefer, to buy the City a replacement car? When presented with a similar hypothetical at oral argument, the San Francisco City Attorney declared such a rule a mere "regulation of use." I disagree. The essence of private property is the right to use that property as one sees fit and for one's own advantage. The police power permits the government to regulate that use so as to promote health, safety, and the general welfare, but it does not permit the

government to achieve its social agenda by ordering a political minority to dedicate its property to the benefit of a group the government wishes to favor. As I explain in more detail in part II below, such a regulation amounts, in practical effect, to a transfer of title and requires the government to pay its way.

But constitutional issues aside the City had another problem with its HCO. In 1985, the state Legislature enacted the Ellis Act, which unequivocally guarantees the right of property owners to abandon the residential rental business. Government Code section 7060, subdivision (a), provides: "No public entity . . . shall, by statute, ordinance, or regulation, or by administrative action implementing any statute, ordinance or regulation, compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease." If this clear language left any doubt about the continuing viability of the HCO, that doubt was finally resolved against the City in *Bullock v. City and County of San Francisco* (1990) 221 Cal. App. 3d 1072, 1102 [271 Cal. Rptr. 44] (*Bullock*), which held that the Ellis Act preempts the HCO. "We conclude," said the court in *Bullock*, "that [the HCO] is preempted by the Ellis Act and is therefore *invalid to the extent it is applied to prevent plaintiff from going out of the residential hotel business*." (*Bullock*, at p. 1102, italics added.) In other words, state law expressly permits property owners to do what the HCO bars them from doing: it permits them to stop leasing to residents.

The City, however, was unwilling so easily to concede defeat. The Ellis Act affirms the continuing power of public entities "to grant or deny . . . zoning . . . approvals." (Gov. Code, § 7060.1, subd. (b).) This provision seems reasonable on its face: property owners are free to stop leasing to

residents, but they still must obey zoning laws regulating the new use to which they intend to put their property. (*See also* Gov. Code, § 7060.7.) Conveniently, the City amended its zoning laws shortly after the Ellis Act became law. As related in the majority opinion (maj. opn., *ante*, at pp. 652-653), one effect of this change was to require the owners of the San Remo Hotel to obtain a conditional use permit before "intensif[ying]" any use of their property as a tourist hotel. (S.F. Planning Code, § 178, subd. (c).) The parties dispute the extent to which the rooms in the San Remo Hotel were ever, in fact, being used as residences, but as the majority points out (maj. opn., *ante*, at pp. 658-663), at least some of those rooms were historically used as residences, and to the extent the owners sought to convert *those* rooms to tourist use, the change required a permit under the new zoning ordinance. In short, the City put in place a zoning mechanism by which it could try to achieve the goals of its preempted HCO, if it chose to do so.

But the City had to proceed cautiously. *Bullock* made clear that the City could not use zoning laws pretextually to bar landlords from exercising their rights under the Ellis Act. As the court stated, "[n]othing in the Ellis Act gives any landlord invoking its protection the unilateral power to effect what amounts to a rezoning of his property . . . . [P] The City is . . . not precluded from seeking to have enjoined a violation of [zoning] ordinances . . ., *so long as this claim is not used as a pretext for halting* [*the property owner's*] *departure from the residential hotel business*." (*Bullock*, *supra*, 221 Cal. App. 3d at p. 1104, italics added.) Implicitly conceding that the Ellis Act is in direct conflict with the HCO, the majority argues (maj. opn., *ante*, at p. 663) the Ellis Act has no effect here because the record does not establish that plaintiffs complied with its notice requirements. (*See* Gov. Code, § 7060.4.) But the power of local governments to implement

the Ellis Act by requiring notice in no way negates the fact that state law has preempted the City from using zoning as a way to discourage property owners from exiting the residential rental business. Government Code section 7060.4 permits local governments to enact *notice requirements*, but it does not permit those governments to enact zoning restrictions that abrogate the very protections the Ellis Act affords. Therefore, whether plaintiffs followed the notice requirements of the Ellis Act is beside the point; the state has occupied this area of law, and the City may not enact and enforce contrary laws. Nevertheless, after the City amended its zoning laws, the preempted HCO was poised to become the ghost that drove zoning decisions in San Francisco.

Here, for example, the owners of the San Remo Hotel sought to convert their hotel to full tourist use. The City's Planning Department told them that—consistent with the recent amendments to the zoning laws—they would need a conditional use permit. Whether to issue a conditional use permit is an adjudicative decision that is exercised at the discretion of the planning commission (S.F. Planning Code, §§ 303, 316, 316.8), and the planning commission exercised its discretion here by conditioning the San Remo Hotel permit on, among other things, compliance with the preempted HCO. The owners of the San Remo Hotel met this condition by paying, in protest, a $567,000 "in lieu fee" (representing a portion of the appraised cost of building replacement housing) and brought this action alleging, among other things, a taking without just compensation in violation of the state Constitution.

This constellation of facts makes this case indistinguishable from *Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854 [50 Cal. Rptr. 2d 242, 911 P.2d 429] (*Ehrlich*). *Ehrlich* addressed the same problem that the United

States Supreme Court recognized in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 [107 S. Ct. 3141, 97 L. Ed. 2d 677] (*Nollan*) and *Dolan v. City of Tigard* (1994) 512 U.S. 374 [114 S. Ct. 2309, 129 L. Ed. 2d 304] (*Dolan*). When a government agency has discretionary authority to permit or prohibit a new use of property, the risk arises that governmental greed will consciously or unconsciously distort the decisionmaking process, causing the agency to exact a condition from the property owner that has nothing to do with mitigating the effects of the proposed new use. This sort of regulatory leveraging, taken to its extreme, might cause a government to impose "stringent land-use regulation which [it] then waives to accomplish other purposes" (*Nollan*, at p. 837, fn. 5 [107 S. Ct. at p. 3149]), and this concern warrants a more searching inquiry by a reviewing court than might otherwise be appropriate.

In *Nollan*, for example, a California agency conditioned a permit to develop beachfront property on dedication of a public easement. The easement, which permitted the public to cross the property to gain access to the ocean, "utterly fail[ed] to further the end" of mitigating the impact of the proposed development on ocean views, and therefore lacked the "essential nexus" that the federal Constitution required and amounted to "'extortion.'" (*Nollan*, *supra*, 483 U.S. at p. 837 [107 S. Ct. at pp. 3148-3149].) Similarly, in *Dolan* the City of Tigard conditioned a permit to greatly expand a retail sales complex on dedication of a strip of property as a pathway for pedestrians and bicycles. The high court held that a permit condition must be "'rough[ly] proportional[]'" "in nature and extent" to mitigating "the impact of the proposed development" (*Dolan*, *supra*, 512 U.S. at p. 391 [114 S. Ct. at pp. 2319-2320] and the City of Tigard had failed "to quantify its findings" that the pathway would mitigate increases in traffic. (*Id.* at p. 395 [114 S. Ct. at p. 2322].) In

Ehrlich, we unanimously extended the principle of *Nollan* and *Dolan* to a case in which a city demanded a *monetary* fee from a developer rather than a dedication of an interest in real property, noting that the same risk of governmental abuse was present. (*Ehrlich*, *supra*, 12 Cal. 4th at p. 876 (plur. opn. of Arabian, J.); *id.* at pp. 899-901 (conc. opn. of Mosk, J.); *id.* at p. 907 (conc. & dis. opn. of Kennard, J.); *id.* at p. 912 (conc. & dis. opn. of Werdegar, J.).) The majority reaffirms the holding of *Ehrlich* today. (Maj. opn., *ante*, at pp. 666-667.)

Here, as in *Ehrlich*, a public agency (the City's Planning Commission) has made a discretionary adjudicative decision with respect to a specific permit application. Contrary to the argument of the majority (maj. opn., *ante*, at pp. 668-670), this case does not involve a legislatively imposed fee for which the risks of abuse are arguably held in check by the political process. (Maj. opn., *ante*, at pp. 670-671.) Rather, in an adjudicative proceeding concerning a single property owner's permit request, the planning commission chose to require HCO compliance and thereby used the leverage it gained by regulating commercial uses of property to exact a $567,000 fee. On these facts, the fee must be roughly proportional in nature and extent to mitigating the impact of the proposed new use of the property. (*Ehrlich*, *supra*, 12 Cal. 4th at p. 876 (plur. opn. of Arabian, J.); *id.* at pp. 899-901 (conc. opn. of Mosk, J.); *id.* at p. 907 (conc. & dis. opn. of Kennard, J.); *id.* at p. 912 (conc. & dis. opn. of Werdegar, J.).) In short, because we are dealing with a discretionary decision of the planning commission rather than direct enforcement of the HCO, the government's decision here, like the decision at issue in *Ehrlich*, was adjudicative.

The majority tries to sidestep this gaping hole in its argument with a footnote asserting that under applicable

zoning laws "conversion of residential rooms to commercial use is unconditionally *prohibited* above the first floor in the North Beach district *except* insofar as permitted by the HCO (S.F. Planning Code, §§ 722.38, 790.84)." (Maj. opn., *ante*, at p. 669, fn. 11.) The majority concludes: "The planning commission, therefore, had no discretion to permit such change in use absent HCO compliance." (*Ibid.*) In other words, the majority argues the planning commission's decision here was legislative, not adjudicative, thereby permitting the majority to exploit the exception it reads into *Ehrlich* for legislatively created permit fees.

First, the majority simply misreads the City's Planning Code. San Francisco Planning Code section 722.38 prohibits conversion from residential to nonresidential use above the first floor, but section 790.84 of that code does not limit the exception from this prohibition to cases where the property owner *complies* with the HCO. Rather, section 790.84 creates an exception for conversions that are "defined and regulated in [the HCO]." The San Francisco Planning Code therefore remains neutral with respect to HCO compliance. It simply provides that its flat prohibition on conversions does not apply when the HCO applies, thereby giving space within which the HCO can operate. Nothing in the Planning Code requires the planning commission to enforce the HCO, nor does the Planning Code state that conversions are prohibited except "as permitted by the HCO." (Maj. opn., *ante*, at p. 669, fn. 11.) In other words, the Planning Code leaves a regulatory gap with respect to conversions regulated in the HCO, and the commission has, *in its discretion*, chosen to fill that gap by requiring HCO compliance. Its decision was not compelled by any legislative rule, and therefore it is no different from the decision at issue in *Ehrlich*. At the very least, the legislative rule was ambiguous, and the planning commission's interpretation of the rule was in that sense adjudicative.

Second, the majority's exception for legislatively created permit fees is mere sophism, particularly where the legislation affects a relatively powerless group and therefore the restraints inherent in the political process can hardly be said to have worked. (*Cf. United States v. Carolene Products Co.* (1938) 304 U.S. 144, 152, fn. 4 [58 S. Ct. 778, 783-784, 82 L. Ed. 1234].) If the agency in *Nollan* had passed a rule requiring all beachfront property owners to dedicate an easement as a condition of developing their properties, those easements would have no better mitigated the effects of development (and they would have been no less objectionable) than the easement that the agency exacted adjudicatively. Of course, when the government may prohibit a certain use of property entirely, it may opt instead to place conditions on that use (*Nollan*, *supra*, 483 U.S. at p. 836 [107 S. Ct. at p. 3148]), but the conditions must be related in some real way to the justification advanced for a complete prohibition. (*Id.* at p. 837 [107 S. Ct. at pp. 3148-3149].) Otherwise, the government has transformed the police power into an efficient way to raise money by regulating political minorities and then selling exemptions from the regulatory scheme, without any real intent to advance the scheme's purported purpose. It becomes "as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury." (*Ibid.*) The government, in effect, says: We have the power; therefore, pay us to leave you alone. By any measure, that is extortion. Moreover, it turns the takings clause on its head. Instead of the government having to pay compensation to property owners, the government now wants property owners to compensate *it* to get back the fair value of property the government took away through regulation.

A public agency can just as easily extort unfair fees legislatively from a class of property owners as it can

adjudicatively from a single property owner. The nature of the wrong is not different or less abusive to its victims, but the scope of the wrong is multiplied many times over. Therefore, I believe *Ehrlich* should apply whenever the risk is great that greed for public revenues has driven public regulatory policy. In other words, where a legislative scheme imposes a burdensome fee on a small class of property owners as a condition to buying relief from a regulation, I believe careful judicial scrutiny is appropriate, including finding a close link between the fee and the purpose of the regulation. In light of the majority's decision, however, we can be sure that agencies will now act legislatively, rather than adjudicatively, and thereby insulate their actions from close judicial scrutiny.

In addition, the HCO is structured in such a way that the same sort of discretionary, case-specific decisionmaking that triggered our holding in *Ehrlich* also takes place under the HCO. The fee that a hotel owner may pay under the HCO so as to buy the right to lease residential rooms to tourists is a fixed portion of the estimated cost of replacing the lost residential housing. (HCO, § 41.13, subd. (a)(4), (5).) Though this cost estimate must be based on two independent appraisals (*ibid.*), it nevertheless permits a discretionary element to enter into the process, with the result that the City and the property owner inevitably end up in a back-and-forth negotiation over the amount of the fee. Obviously, the City has the upper hand in this negotiation--because it is holding the conversion permit hostage--and therefore the City is free to squeeze as large a fee as possible from the property owner. That dynamic brings into play all the concerns that justified our holding in *Ehrlich*, and therefore the same careful scrutiny ought to apply.

Finally, and most importantly, the majority fails to appreciate that, if the San Francisco Planning Code somehow requires across-the-board compliance with the HCO, then the Ellis Act preempts that requirement, just as it preempts the HCO itself. The zoning exception to the Ellis Act permits the City to place certain limits on how a property owner may use property, but as *Bullock* held, the City may not use that zoning power to erect barriers to a property owner's decision to exit the residential rental business, even if the effect is to reduce the residential housing stock of the City. (*Bullock*, *supra*, 221 Cal. App. 3d at p. 1104.) In other words, the planning commission, acting under the zoning exception to the Ellis Act, might be able to block the owners of the San Remo Hotel from renting more rooms to tourists, *assuming its purpose is to limit the number of tourist hotel rooms in the area*, but the commission may not do so *to protect the City's stock of low-cost residential housing*, because that would be inconsistent with the state law right of property owners to stop leasing to residents. Nevertheless, here the majority argues (and the City concedes) that the preservation of low-cost housing was the planning commission's purpose when it required HCO compliance. (*See*, *e.g.*, maj. opn., *ante*, at pp. 672-679.) That purpose was simply impermissible under the Ellis Act, and even if it were somehow permissible, the majority acknowledges that at least *some* rooms at the San Remo Hotel were historically used as tourist rooms (maj. opn., *ante*, at pp. 658-663), and therefore it cannot, in any case, justify the planning commission's decision to charge a conversion fee for *all* rooms. (*Cf. id.* at pp. 667-678.)

Of course, despite the Ellis Act problem, the majority and the City have no choice but to assert that the planning commission's purpose was the preservation of residential housing, because if the planning commission had some other purpose, it could not—under any standard of review (rational

basis, reasonable relationship, or rough proportionality)—have attached the condition that the owners of the San Remo Hotel take steps to preserve low-cost residential housing. Just as in *Nollan*, where the easement providing access to the beach was not related in any way to mitigating the obstruction of an ocean view, similarly here the preservation of low-cost housing is not related in any way to mitigating the impact of more tourist hotel rooms in the neighborhood of the San Remo Hotel. In other words, by requiring HCO compliance as a condition for renting more rooms to tourists, the planning commission has revealed its true colors: it does not care about the number of hotel rooms in the area; what it really cares about is preventing property owners from exiting the residential rental business. But this the City simply cannot do under the Ellis Act—if not for the fact that the majority has chosen to turn a blind eye.

II. *THE HCO IS FACIALLY UNCONSTITUTIONAL UNDER THE TAKINGS CLAUSE OF THE CALIFORNIA CONSTITUTION*

Our takings jurisprudence—both state and federal—has become so labyrinthine and compartmentalized that attempts to find just the right standard for the case often entirely miss the underlying point of the exercise. We speak of ad hoc inquiries, relevant factors, per se takings, and means-end relationships. We chip away at the problem with separate lines of cases addressing distinct issues such as development permits and price controls. And all these efforts, valid as far as they go, leave us still groping for a basic conceptual approach that takes seriously the constitutional prohibition against uncompensated takings of private property. Thus, like the Wizard of Oz, we mystify our audience with the look and feel of great erudition, while concealing the humble reality that we have yet to solve the problem in a satisfactory way.

But, here, we need not consider all these arcane standards and fragmentary theories. These are analytical tools relevant to *tough* cases—cases in which it is unclear whether property *has* been taken. This is *not* a tough case. Here, property unquestionably has been taken. No matter the analysis, the facts of this case come down to one thing—the City and County of San Francisco has expropriated the property and resources of a few hundred hotel owners in order to ameliorate—off budget and out of sight of the taxpayer—its housing shortage. In short, this ordinance is not a matter of efficiently organizing the uses of private property for the common advantage; instead, it is expressly designed to shift wealth from one group to another by the raw exercise of political power, and as such, it is a per se taking requiring compensation.

The majority rejects the legal theories on which the property owners have proceeded, but it fails to confront the more basic issue that prefigures all others: the City has replaced taxation and the provision of public services with a regulation that orders certain people to use their private property to do the government's work. If the relevant case law is sparse, it is only because no public agency has ever been so bold.

"Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner." (Cal. Const., art. I, § 19.) In a simple world where "property" is understood to refer to tangible property and "tak[ing]" is understood to be a formal transfer of title, this constitutional injunction is relatively easy to apply. But such a narrow application of the takings clause would trivialize the right. Restriction of any one of the several rights that constitute private property in effect takes that property. For example, a property owner cares little about the

formalities of title possession when the property in question has been rendered nearly valueless by regulations prohibiting its most productive uses. In that case, the regulations have deprived the owner of so many of the rights that originally constituted the property that the property has, in effect, ceased to exist, or it has become a mere empty shell. Furthermore, in a complex and increasingly service and information-based economy, the constitutional protection of intangible property is just as critical as the protection of physical property was to an agrarian and manufacturing economy.

Nevertheless, in countless ways, government takes property—in the sense of regulating its use—without always having to compensate the owner. In *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 413 [43 S. Ct. 158, 159, 67 L. Ed. 322, 28 A.L.R. 1321] (*Penna. Coal Co.*), Justice Holmes noted that "[g]overnment hardly could go on" if it had to pay its way every time a regulation restricted the use of property. The law has long recognized, for example, that government might, in the exercise of the police power, act to proscribe a nuisance, and in so doing it need not pay compensation. (*See, e.g.*, Civ. Code, § 3479; Code Civ. Proc., § 731.) Holmes spoke of "an average reciprocity of advantage" whereby a property regulation ultimately works for the enrichment of all, though it imposes specific limitations on the use of certain property. (*Penna. Coal Co.*, at p. 415 [43 S. Ct. at p. 160].)

For example, business owners on a popular shopping street might generally agree that their properties would be more attractive, and hence more valuable, if all the businesses used small, attractive signs rather than huge, garish billboards. Nevertheless, without regulation, competitive forces will inevitably cause business signs to become ever larger and more visually intrusive. No business owner wants

to be the only one on a shopping street to have a small sign, and transaction costs often prevent owners from coming together to negotiate an agreement that would work to their common advantage. In that case, a regulation that has the immediate effect of reducing property value by restricting sign size, has the indirect effect of enhancing that value for all affected businesses. (*See generally* Epstein, Takings: Private Property and the Power of Eminent Domain (1985) pp. 195-215.)

A similar justification can be articulated in the case of the regulations proscribing nuisance. For example, if the law prohibits a property owner from operating a slaughterhouse in a residential neighborhood, the immediate effect might be to lower incrementally the value of the regulated property, but the indirect effect is to place that property in a neighborhood rendered more desirable for residential use, thereby enhancing its value. Again the same rationale can be extended to justify zoning and planning regulations that constrain the freedom of developers but enhance all property values over the long term by making cities more attractive and efficient. Finally, when a regulatory scheme creates new value for a property owner by establishing an artificial monopoly—as, for example, might be true in the case of a utility—the government can regulate the profit the property owner gains from its government-created preferential status. All these examples point to the same fundamental principle: property owners, given a choice, will prefer to own property in a community having appropriate and mutually beneficial regulations, because such property has greater value by reason of the regulation. Accordingly, regulatory authority is not inherently confiscatory in all cases.

But the corollary of this rule—one I think is implicit in the takings clause of the state Constitution—is that a regulation *is*

a taking if, rather than promoting "an average reciprocity of advantage" (*Penna. Coal Co., supra*, 260 U.S. at p. 415 [43 S. Ct. at p. 160]), it is merely designed to benefit one class of citizens at the expense of another; that is, if it simply shifts wealth by a raw act of government power. The government, in that case, has deprived the property owner of a right associated with his property, shifting that right to another party, but it has in no sense compensated the owner by enhancing, in some real way, the value of the rights the owner has retained.

In short, it might be perfectly legitimate for the City to help the low-income residents of San Francisco, but it may not do so at the expense of some small class of persons simply by legislating a transfer of property rights. Of course, providing assistance to low-income residents of the community incrementally benefits all members of the community both by removing the blight of homelessness and by representing a general moral good, but here the burden of this common benefit falls so disproportionately on 500 business owners in a city of 776,700 residents that careful judicial scrutiny is warranted. Where the impact is so disproportionate, we cannot say that we have "an acceptable level of assurance that *over time* the burdens associated with collectively determined improvements will have been distributed 'evenly' enough so that everyone will be a net gainer." (Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law* (1967) 80 Harv. L.Rev. 1165, 1225, original italics.) Moreover, it simply stretches the police power too far to suggest that the City is somehow regulating the use of property for the common advantage when it redistributes wealth by ordering a political minority to dedicate its property to the benefit of another group. The police power can no more be used in this way than it could be used to order a rich

man to give a beggar a dime. Here, the primary beneficiary of the regulation is not the common advantage but the low-income individuals who obtain the inexpensive housing. Laudable as that goal might be, the takings clause precludes the government from achieving the goal by police power regulation.

Nor can the HCO be justified under the theory that the City is merely requiring property owners to continue the existing use of their property. (*See, e.g., Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 125 [98 S. Ct. 2646, 2659-2660, 57 L. Ed. 2d 631].) Such a rule would punish a property holder for using property in a way that proved popular. Moreover, it fails to recognize the effect of shifting economic conditions and therefore locks property into unproductive uses. But most important, such a rule represents a dedication of property rights to the public, and in all fairness the public should have to pay for these rights, just as a private party would. For these reasons, I would not extend the holding of *Penn Central* beyond its unique factual context, including the fact that the regulatory authority in that case might have permitted a more moderate development of the property than the one the property owner sought and it gave the property owner transferable development rights as compensation. (*Id.* at pp. 136-137 [98 S. Ct. at pp. 2665-2667].)

Here, the City has essentially said to 500 unlucky hotel owners: We lack the public funds to fill the need for affordable housing in San Francisco, so you should solve the problem for us by using your hotels to house poor people. The City might as well have ordered the owners of small grocery stores to give away food at cost. The federal takings clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should

be borne by the public as a whole." (*Armstrong v. United States* (1960) 364 U.S. 40, 49 [80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554].) I believe the same principle underlies our state takings clause. Accordingly, I would find the HCO facially unconstitutional.

Conclusion

I agree with part I of the concurring and dissenting opinion of Justice Baxter to the effect that the San Francisco Planning Code does not require a conditional use permit for tourist use of hotel rooms that were traditionally dedicated to tourist use, and therefore with respect to those rooms, a conversion fee was inappropriate under any takings standard. In addition to the points Justice Baxter makes, I would find the HCO preempted by the Ellis Act and facially unconstitutional, and therefore that the plaintiffs were free to disregard the HCO, and the HCO cannot render tourist use of their hotel illegal. Furthermore, because the HCO was in effect void, plaintiffs' admission under the HCO concerning residential use of their hotel is not binding on them. Moreover, the admission was based on a 1981 version of the HCO, which permitted tourist use of the rooms during the all-important summer season (1981 S.F. Admin. Code, § 41.16, subd. (a)(3)(B)), and therefore the City cannot use that admission against plaintiffs now that it seeks to restrict plaintiffs *under a different ordinance* from tourist use during *any* season. Therefore, I would affirm the Court of Appeal's decision with respect to the writ petition.

I would also affirm the Court of Appeal's conclusion that the *Ehrlich* "'rough proportionality'" standard (*Ehrlich, supra*, 12 Cal. 4th at p. 876) applies to the San Francisco Planning Commission's decision to require HCO compliance. This decision was adjudicative both in fact and form, and

even if it were not, it would nevertheless be extortionate in nature and therefore suspect. I would also affirm the Court of Appeal's conclusion that, under the *Ehrlich* standard, the City has failed to show a sufficiently close link between its fee, which will subsidize low-cost residential housing, and the regulatory purpose of limiting the number of hotel rooms in the neighborhood (that being the only purpose that the planning commission could have had without impinging on plaintiffs' rights under the Ellis Act).

Once again a majority of this court has proved that "'If enough people get together and act in concert, they can take something and not pay for it.'" (*Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal. 4th 1006, 1035, fn. 1 [73 Cal. Rptr. 2d 841, 953 P.2d 1188] (dis. opn. of Brown, J.), quoting O'Rourke, Parliament of Whores (1991) p. 232.) But theft is still theft. Theft is theft even when the government approves of the thievery. Turning a democracy into a kleptocracy does not enhance the stature of the thieves; it only diminishes the legitimacy of the government. Like Justice Rehnquist, I "see no reason why [constitutional protections of property rights] should be relegated to the status of a poor relation." (*Dolan*, *supra*, 512 U.S. at p. 392 [114 S. Ct. at p. 2320].) The right to express one's individuality and essential human dignity through the free use of property is just as important as the right to do so through speech, the press, or the free exercise of religion. Nevertheless, the property right is now—in California, at least—a hollow one. I dissent and hope the plaintiffs find a more receptive forum in the federal courts.

APPENDIX F

SAN FRANCISCO RESIDENTIAL HOTEL UNIT CONVERSION AND DEMOLITION ORDINANCE

SEC. 41.1. TITLE.

This Chapter shall be known as the Residential Hotel Unit Conversion and Demolition Ordinance. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.2. PURPOSE.

It is the purpose of this ordinance to benefit the general public by minimizing adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition. This is to be accomplished by establishing the status of residential hotel units, by regulating the demolition and conversion of residential hotel units to other uses, and by appropriate administrative and judicial remedies. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.3. FINDINGS.

The Board of Supervisors finds that:

(a) There is a severe shortage of decent, safe, sanitary and affordable rental housing in the City and County of San Francisco and this shortage affects most severely the elderly, the disabled and low-income persons.

(b) The people of the City and County of San Francisco, cognizant of the housing shortage of San Francisco, on November 4, 1980, adopted a declaration of policy to increase the city's housing supply by 20,000 units.

(c) Many of the elderly, disabled and low-income persons and households reside in residential hotel units.

(d) A study prepared by the Department of City Planning estimated that there were only 26,884 residential hotel units in the City in December of 1979, a decrease of 6,098 such units from 1975. Since enactment of this Chapter, residential hotel units have continued to decrease, at a slower rate: in 1981, there were 20,466 residential hotel units as defined by this Chapter; in 1988, there were 18,723 residential hotel units, a decrease of 1,743 over a period of 7 years. The decrease is caused by vacation, conversion or demolition of residential hotel units. Continued vacation, conversion or demolition of residential hotel units will aggravate the existing shortage of affordable, safe and sanitary housing in the City and County of San Francisco.

(e) As a result of the removal of residential hotel units from the rental housing market, a housing emergency exists within the City and County of San Francisco for its elderly, disabled and low-income households.

(f) Residential hotel units are endangered housing resources and must be protected.

(g) The Board of Supervisors and the Mayor of the City and County of San Francisco recognized this housing emergency and enacted an ordinance which established a moratorium on the demolition or conversion of residential

hotel units to any other use. The moratorium ordinance became effective on November 21, 1979.

(h) The conversion of residential hotel units affects those persons who are least able to cope with displacement in San Francisco's housing market.

(i) It is in the public interest that conversion of residential hotel units be regulated and that remedies be provided where unlawful conversion has occurred, in order to protect the resident tenants and to conserve the limited housing resources.

(j) The tourist industry is one of the major industries of the City and County of San Francisco. Tourism is essential for the economic well being of San Francisco. Therefore, it is in the public interest that a certain number of moderately priced tourist hotel units be maintained especially during the annual tourist season between May 1st and September 30th.

(k) Tourist activity has increased steadily in San Francisco since 1983. There are currently approximately 23,000 tourist hotel units in the City and over 3,000 additional such units will be added by 1988 through new construction. However, there are presently only 18,723 residential hotel units and this number is not increasing. In addition, rents for residential hotel units have risen an average of 23 percent annually since 1980, making such units less and less affordable as a housing resource for the elderly, disabled and low-income persons. Since the adoption of this ordinance, hotel owners have begun to leave residential units vacant during the non- tourist season (October 1st - April 30th) in order to rent these units to tourists at high daily rental rates during the tourist season (May 1st - September 30th). This activity, which further reduces the available supply of low and moderate income

housing in San Francisco, is not presently prohibited under this Chapter. In order to assure that residential hotel owners do not continue to withhold these available residential units from prospective permanent residents during the non-tourist season, it is necessary to restrict the tourist season rental of vacant residential hotel units. Such a restriction will not interfere with San Francisco's tourism, which remains essential to the economic well-being of the City.

(l) Since enactment of this Chapter, it has become apparent that portions of this Chapter were difficult and extremely costly to interpret and enforce, resulting in an inability to fulfill the essential intent of this Chapter and to prevent illegal conversions.

(m) Since enactment of this Chapter, residential units have been converted to tourist units and the hotel operators have paid the 40 percent in-lieu fee to the City. This amount, 40 percent of the cost of construction of comparable units plus site acquisition cost, has not been adequate to provide replacement units. Federal, state and local funds were incorrectly assumed at that time to be available and sufficient to make up the shortfall between the 40 percent in-lieu fee and actual replacement costs. For example, in 1979 the federal government was spending 32 billion dollars on housing and is spending only 7 billion dollars in 1989.

(n) Certain uses provide both living accommodation and services, such as health care, personal care and counseling, to residents of the City. Examples of such uses are hospital, skilled nursing facility, AIDS hospice, intermediate care facility, asylum, sanitarium, orphanage, prison, convent, rectory, residential care facility for the elderly, and community care facility. Such facilities are often operated in building owned or leased by non-profit

organizations and provide needed services to the City's residents. To subject such facilities to the provisions of this Chapter may deter future development of such facilities. It is desirable that such facilities exist and the City should encourage construction and operation of such facilities.

(o) In addition, a form of housing facilities called "transitional housing" provides housing and supportive services to homeless persons and families and is intended to facilitate the movement of homeless individuals and families to independent living or longer term supportive residences in a reasonable amount of time. Transitional housing has individual living quarters with physical characteristics often similar to a residential hotel (i.e. accommodations which provide privacy to residents) and provides a source of interim housing for homeless individuals and families seeking to live independently.

(p) The City's public, quasi-public and private social agencies serving the elderly and needy persons often find it difficult to immediately locate suitable housing units for such persons returning to independent living after hospitalization or upon leaving skilled-nursing or intermediate care facilities within a short time after their discharge from a health facility. Such persons often will require minimum supervision and other interim social service support. The provision of a stable number of housing units for such emergency needs until permanent housing can be secured and supportive services arranged are necessary and desirable for the City. Emergency housing will have physical characteristics similar to "transitional housing" and is often intended to be occupied for a period of less than one month.

(q) The City also wishes to provide positive incentive to encourage residential hotel owners and operators to comply

with the terms of this Chapter. Hotel owners have expressed a need to rent certain residential units on a short term basis during the winter months. In an effort to address this need and to encourage compliance with this Chapter, the City wishes to provide an opportunity to hotel owners who have complied with the terms of this Chapter to rent a limited number of residential units to tourists during the winter months. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.4. DEFINITIONS.

(a) **Certificate of Use**. Following the initial unit usage and annual unit usage determination pursuant to the provisions of Sections 41.6 and 41.10 below, every hotel shall be issued a certificate of use specifying the number of residential and tourist units herein.

(b) **Comparable Unit**. A unit which is similar in size, services, rental amount and facilities, and which is located within the existing neighborhood or within a neighborhood with similar physical and socioeconomic conditions.

(c) **Conversion**. The change or attempted change of the use of a residential unit as defined in subsection (q) below to a tourist use, or the elimination of a residential unit or the voluntary demolition of a residential hotel. However, a change in the use of a residential hotel unit into a non-commercial use which serves only the needs of the permanent residents, such as resident's lounge, storeroom or common area, shall not constitute a conversion within the meaning of this Chapter.

(d) **Disabled Person.** A recipient of disability benefits.

(e) **Elderly Person.** A person 62 years of age or older.

(f) **Emergency Housing.** A project which provides housing and supportive services to elderly or low-income persons upon leaving a health facility and which has its primary purpose of facilitating the return of such individuals to independent living. The emergency housing shall provide services and living quarters pursuant to Section 41.13 herein and may be provided as part of a "transitional housing" project.

(g) **Hotel**. Any building containing six or more guest rooms intended or designed to be used, or which are used, rented or hired out to be occupied or which are occupied for sleeping purposes and dwelling purposes by guests, whether rent is paid in money, goods, or services. It includes motels, as defined in Chapter XII, Part II of the San Francisco Municipal Code (Housing Code), but does not include any jail, health facilities as defined by Section 1250 of the Health and Safety Code, asylum, sanitarium, orphanage, prison convent, rectory, residential care facility for the elderly as defined in Section 1569.2 of the Health and Safety Code, residential facilities as defined in Section 1502 of the Health and Safety Code or other institution in which human beings are housed or detained under legal restraint, or any private club and nonprofit organization in existence on September 23, 1979; provided, however, that nonprofit organizations which operated a residential hotel on September 23, 1979 shall comply with the provisions of Section 41.8 herein.

(h) **Interested Party.** A permanent resident of a hotel, or his or her authorized representative, or a former tenant of a hotel who vacated a residential unit within the past 90 days preceding the filing of complaint or court proceeding to enforce the provisions of this Chapter. Interested party shall also mean any nonprofit organization, as defined in Section 41.4(k), which has the preservation or improvement of

housing as a stated purpose in its articles of incorporation and/or bylaws.

(i) **Low-income Household**. A household whose income does not exceed 60 percent of the median income for the San Francisco Standard Metropolitan Statistical Area as published by the United States Department of Housing and Urban Development and Housing and Community Development Act of 1974.

(j) **Low-Income Housing.** Residential units whose rent may not exceed 30 percent of the gross monthly income of a low-income household as defined in subsection (i) above.

(k) **Nonprofit Organization**. An entity exempt from taxation pursuant to Title 26, Section 501 of the United States Code.

(l) **Operator**. An operator includes the lessee or any person or legal entity whether or not the owner, who is responsible for the day-to-day operation of a residential hotel and to whom a hotel license is issued for a residential hotel.

(m)**Owner**. Owner includes any person or legal entity holding any ownership interest in a residential hotel.

(n) **Permanent Resident.** A person who occupies a guest room for at least 32 consecutive days.

(o) **Posting or Post**. Where posting is required by this Chapter, material shall be posted in a conspicuous location at the front desk in the lobby of the hotel, or if there is no lobby, in the public entranceway. No material posted may be removed by any person except as otherwise provided in this Chapter.

(p) **Residential Hotel.** Any building or structure which contains a residential unit as defined in (q) below unless exempted pursuant to the provisions of Sections 41.5 or 41.7 below.

(q) **Residential Unit.** Any guest room as defined in Section 203.7 of Chapter XII, Part II of the San Francisco Municipal Code (Housing Code) which had been occupied by a permanent resident on September 23, 1979. Any guest room constructed subsequent to September 23, 1979 or not occupied by a permanent resident on September 23, 1979 shall not be subject to the provisions of this Chapter; provided however, if designated as a residential unit pursuant to Section 41.6 of this Chapter or constructed as a replacement unit, such residential units shall be subject to the provisions of this Chapter.

(r) **Tourist Hotel.** Any building containing six or more guest rooms intended or designated to be used for commercial tourist use by providing accommodation to transient guests on a nightly basis or longer. A tourist hotel shall be considered a commercial use pursuant to City Planning Code Section 216(b) and shall not be defined as group housing permitted in a residential area under City Planning Code Section 209.2.

(s) **Tourist Unit.** A guest room which was not occupied on September 23, 1979, by a permanent resident or is certified as tourist unit pursuant to Sections 41.6, 41.7 or 41.8 below. Designation as a tourist unit under this Chapter shall not supersede any limitations on use pursuant to the Planning Code.

(t) **Transitional Housing.** A project which provides housing and supportive services to homeless persons and families or low-income households at risk of becoming

homeless which has as its purpose facilitating the movement of homeless individuals or at-risk low-income households to independent living within a reasonable amount of time. The transitional housing shall provide services and living quarters as approved by the Planning Commission that are similar to the residential unit being replaced pursuant to Section 41.13 herein and shall comply with all relevant provisions of City ordinances and regulations. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.5. APPLICABILITY OF THIS CHAPTER.

The provisions of this Chapter shall not apply to:

(a) The change in use of a residential unit where the unit has been found to be unfit for human habitation prior to November 23, 1979 and ordered to be vacated by the Department of Public Health; or

(b) A hotel wherein 95 percent of the guest rooms were tourist units on September 23, 1979; or

(c) A unit which rented for over $1,000 per month on September 23, 1979; or

(d) A hotel in which 95 percent of the total number of guest rooms rented for more than $1,000 per month on September 23, 1979; or

(e) A building which was unlawfully converted to a rooming house or hotel in violation of the provisions of the City Planning Code; or

(f) A building which meets the requirements of Section 41.7(c) below for a claim of exemption for partially-completed conversions; or

(g) A building which meets the requirements of Section 41.7(b) below for a claim of exemption for low-income housing; or

(h) A building which is lawfully approved by the City after September 23, 1979, and is not a replacement unit pursuant to Section 41.13 herein, so long as it is operated by a public entity or a nonprofit organization as a jail, health facilities as defined by Section 1250 of the Health and Safety Code, asylum, sanitarium, orphanage, prison, convent, rectory, residential care facility for the elderly as defined in Section 1569.2 of the Health and Safety Code, residential facilities as defined in Section 1502 of Health and Safety Code, or other institution in which human beings are housed or detained under legal restraint. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.6. INITIAL STATUS DETERMINATION.

(a) **Filing of Initial Status Determination; Time Limit.** Within 30 calendar days of the mailing date of the summary of the ordinance and the prescribed reporting forms, the owner or operator of each hotel shall file either a statement of exemption, a claim of exemption based on low-income housing, a claim of exemption based on partially completed conversion, or an initial unit usage report as specified below. All filing shall be accompanied by supporting evidence. However, upon application by an owner or operator and upon showing a good cause therefor, the Director of the Department of Building Inspection may grant an extension of time not to exceed 30 days for filing. Owner or operator shall

post a notice on the day of filing that a copy of the initial status determination document filed with the Director of the Department of Building Inspection is available for inspection between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday.

(b) **Filing of Initial Unit Usage Report.** All hotels not covered by the exemptions in Sections 41.5, 41.7 or 41.8 must file an initial unit usage report containing the following:

(1) The number of residential and tourist units in the hotel as of September 23, 1979;

(2) The designation by room number and location of the residential units and tourist units as of seven calendar days prior to the date of filing the report;

(3) The total number of residential and tourist rooms in the hotel as of seven calendar days prior to date of filing the report.

(c) **Insufficient Filing.** If the Director of the Department of Building Inspection or his designee determines that additional information is needed to make a determination, the Director shall request the additional information in writing. The owner or operator shall furnish the requested information within 15 calendar days upon receipt of the written request. Owner or operator shall immediately post a notice that a copy of the requested information is available for inspection between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday at the Department of Building Inspection. If the requested information is not furnished, all the guest rooms not supported by evidence shall be deemed to be residential units.

(d) **Certification of Units.** The Director of the Department of Building Inspection shall review the information and accompanying supporting data. A certified copy of hotel tax returns for the calendar year 1979 may be used to establish the number of tourist units and the Director of the Department of Building Inspection or the Director's designee may personally inspect units to establish the number of tourist units. If, in the opinion of the Director of the Department of Building Inspection, the initial unit usage report is supported by adequate supporting evidence, the Director shall certify the number of residential and tourist units within 90 calendar days of its submission. The owner or operator shall have the burden of proving the number of tourist units claimed by a preponderance of evidence.

Notwithstanding any other provisions in this Chapter, if an owner or operator took possession of the hotel operation after September 23, 1979 and before June 15, 1981, and if the owner or operator can demonstrate that good cause exists why he/she cannot obtain supporting evidence from the previous owner or operator to file the initial report, the owner or operator shall base his/her filing on information available to him/her two weeks after he/she took possession of the hotel; any units which are vacant on that date shall be allocated equally between tourist and residential uses; provided that a permanent resident may rebut this presumption by clear and convincing evidence.

After the Director of the Department of Building Inspection certifies the number of residential and tourist units, the Director shall issue a certificate of use. The Certificate of Use shall be posted permanently in the lobby or entranceway of the hotel.

(e) **Failure to File Statement of Exemption, Claim of Exemption or Initial Unit Usage Report.** If no initial unit usage report, or statement of exemption, or a claim of exemption based on partially completed conversion, or a claim of exemption based on low-income housing for all of the guest rooms, is filed for a hotel within the time set forth in Section 41.6(a), the Director of Department of Building Inspection shall mail a notice to the owner or operator of record by registered or certified mail stating that all the rooms in the hotel shall be deemed residential units unless the owner or operator files unit usage report within 10 calendar days of the mailing date of said notice and that a late filing fee of $50 will be assessed in addition to the fee set forth in Section 41.11 of this Chapter. If the owner or operator fails to submit a unit usage report within 10 calendar days after notification by the Department of Building Inspection, a certificate of use for residential units only shall be issued.

(f) **Appeal of Initial Determination.** An owner or operator may appeal the initial unit status determination by the Director of the Department of Building Inspection provided that there was no challenge pursuant to the provisions of subsection (g) below, and further provided that an appeal is filed within 10 calendar days of the mailing of the certification. If an appeal is filed, a copy of the notice of appeal shall be posted by the owner or operator and a hearing pursuant to the provisions of Section 41.8(b) shall be scheduled.

(g) **Challenge; Standing; Statute of Limitation.** Challenges to the information contained in the initial status determination report filed by the owner or operator may be filed by an interested party in writing provided that it is submitted within 15 calendar days from the date the report to the Department of Building Inspection is filed. Upon receipt

of a challenge, a hearing shall be held by the Director of the Department of Building Inspection or his designee pursuant to the provisions of Section 41.11(b). The owner or operator shall have the burden of proving by a preponderance of evidence that the information filed is correct.

(h) **Reporting Forms for Initial Unit Usage Report.** Compliance by any party or by the City of San Francisco with notice, filing, challenge, designation of unit and certification requirements of Ordinance 330-81 regarding the initial status of units shall satisfy similar requirements set forth in this Chapter and all such notices, filings, challenges, designations or certificates shall have the same force and effect as if made pursuant to this subsection. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.7. STATEMENTS OF EXEMPTION; APPLICABILITY OF THIS CHAPTER.

(a) **Statement of Exemption Based on Inapplicability of This Chapter.** Any hotel claiming that this Chapter does not apply, under the provisions of Sections 41.5(a) through 41.5(d), shall file a statement of exemption specifying the basis for the exemption. Any hotel claiming exemption under the provisions of Sections 41.5(b) through 41.5(d) shall also state the total number of guest rooms and the number of residential hotel units with monthly rent over $1,000 per month.

(b) **Claim of Exemption Based on Low-Income Housing.** To qualify for a claim of exemption based on low-income housing, the units to be rehabilitated meet the following requirements:

(1) A claim for this exemption has been filed and the requisite fees paid to the Department of Building Inspection no later than 60 calendar days after the effective date of this ordinance;

(2) With the exception of ground floor commercial space, the entire building must be completely occupied as low-income housing;

(3) The Director of the Department of Building Inspection finds that the proposed elimination of a unit is necessary to comply with Building Code and Housing Code requirements; and

(4) Alternate guest rooms are made available within the building to the displaced permanent residents; or

(5) In those circumstances where it is necessary to relocate a permanent resident off site, the permanent resident shall receive the actual moving expenses and the difference between the rent at the time of relocation and the rent of the temporary housing during the period of rehabilitation.

(6) The owner or operator and successors in interest shall continue to maintain all units in the rehabilitated hotel as low-income housing for 25 years. A deed restriction on such use shall be submitted to the City Attorney's Office for approval. An approved copy of the deed restriction shall be forwarded to the Director of the Department of Building Inspection and the original shall be filed with the Recorder by the owner or operator.

(c) **Claim of Exemption Based on Partially Completed Conversion.** A claim of exemption based on partially completed conversion shall not be approved until and unless

owner or operator shows that all of the following requirements are met:

(1) An application for partially completed conversion was filed no later than 60 calendar days after the effective date of this ordinance;

(2) The owner or operator has commenced work on extensive Capital Improvements and Rehabilitation Work prior to November 23, 1979, as defined in Section 37.2 of the San Francisco Administrative Code (the San Francisco Rent Stabilization and Arbitration Ordinance) and has completed such work on at least 35 percent of the units intended to be converted or has expended 40 percent of the total sum budgeted for said work;

(3) The owner or operator or previous owner or operator shall have clearly demonstrated his/her intention to convert all of the residential units in the subject building to tourist units as of November 23, 1979. Satisfactory evidence of intention to convert may be demonstrated by the following factors, including but not limited to:

(A) Whether an architect has been engaged to prepare plans and specifications; or

(B) Whether applications for construction work have been received; or

(C) Whether applications for the necessary permits have been submitted to all relevant city departments; or

(D) Whether a building permit has been issued.

(4) Each permanent resident displaced by the conversion is offered relocation assistance as set forth in Section 41.17(b) below; and

(5) For each vacant residential unit converted, but not occupied by a permanent resident, a sum of $250 per unit not to exceed a total of $10,000 shall be deposited in the San Francisco Residential Hotel Preservation Account of the Repair and Demolition Fund established pursuant to Section 203.1 of the San Francisco Building Code (being Chapter 1, Article 2, Part II of the San Francisco Municipal Code) to be used exclusively for the repair, purchase and rehabilitation of residential hotel units by agencies of the City and County of San Francisco and to be administered by the Department of Public Works.

(d) Consistent with Planning Code Section 183, any unit deemed to be a tourist unit which has remained continuously vacant for three years following the zoning change in a zoning district not allowing tourist hotels shall lose its nonconforming status, and may be opened only for residential hotel or group housing uses. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.8. REQUIREMENTS FOR NONPROFIT ORGANIZATIONS.

(a) **Initial Unit Usage Report.** Within 90 days of the adoption of this amended Chapter, the Department of Building Inspection shall notify all nonprofit organizations operating hotels that the nonprofit organization must comply with the Initial Status Determination provisions of Section 41.6 herein.

(b) **Annual Unit Usage Report.** All nonprofit organizations operating hotels with residential units shall

comply with the provisions of Section 41.10 herein in the event that the status of the units in the hotel changes from the designation contained in the Initial Unit Usage Report.

(c) **One-for-one Replacement.** If a nonprofit organization seeks to demolish residential units or remove residential units from housing use, or sells or otherwise transfers the building containing residential use, it shall comply with the provisions of Section 41.13 of this Chapter.

(d) **Applicability of this Chapter.** This chapter shall not apply to a hotel which has a certificate of use for all residential units but contained no permanent residents on September 23, 1979, provided that the hotel is owned, leased or operated by a nonprofit organization at the time this exemption is sought. The owner, operator or lessee of such a hotel must file with the Director of the Department of Building Inspection evidence to support such exemption. If the exemption is approved, the Director shall issue a certificate of use designating all the hotel's units as tourist units; provided, however, that the certificate shall not be issued until the hotel owner, operator or lessee has paid any penalties imposed under Section 41.6(e) or Section 41.10(f) or (g), or released any liens imposed under Section 41.20(d). (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.9. RECORDS OF USE.

(a) **Daily Log.** Each residential hotel shall maintain a daily log containing the status of each room, whether it is occupied or vacant, whether it is used as a residential unit or tourist unit and the name under which each adult occupant is registered. Each hotel shall also provide receipts to each adult occupant, and maintain copies of the receipts, showing: the

room number; the name of each adult occupant; the rental amount and period paid for; and any associated charges imposed and paid, including but not limited to security deposits. The daily log shall be available for inspection pursuant to the provision of Section 41.11(c) of this Chapter upon demand by the Director of the Department of Building Inspection or the Director's designee between the hours of 9 a.m. and 5 p.m., Monday through Friday unless the Director of the Department of Building Inspection and the City Attorney reasonably believe that further enforcement efforts are necessary for specified residential hotels, in which case the Department of Building Inspection shall notify the hotel owner or operator that the daily logs shall be available for inspection between the hours of 9 a.m. and 7 p.m.

(b) **Weekly Report.** Following the initial determination, an owner or operator of residential units shall post on each Monday before 12 noon the following information:

(1) The number of tourist units to which the owner or operator is currently entitled and the date the certificate of use was last issued;

(2) The number of guest rooms which were used as tourist units each day of the preceding week. Evidence of compliance with requirements imposed hereunder shall be preserved by the owner or operator for a period of not less than two years after each posting is required to be made. The owner or operator shall permit the Director of the Department of Building Inspection or his designee to inspect the hotel records and other supporting evidence to determine the accuracy of the information posted. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.10. ANNUAL UNIT USAGE REPORT.

(a) **Filing.** On November 1st of each year every hotel owner or operator subject to this Chapter shall file with the Department of Building Inspection an Annual Unit Usage Report containing the following information:

(1) The total number of units in the hotel as of October 15th of the year of filing;

(2) The number of residential and tourist units as of October 15th of the year of filing;

(3) The number of vacant residential units as of October 15th of the year of filing; if more than 50 percent of the units are vacant, explain why;

(4) The average rent for the residential hotel units as of October 15th of the year of filing;

(5) The number of residential units rented by week or month as of October 15th of the year of filing; and

(6) The designation by room number and location of the residential units and tourist units as of October 15th of the year of filing. Owner or operator shall maintain such designated units as tourist or residential units for the following year unless owner or operator notifies in writing the Department of Building Inspection of a redesignation of units; owner or operator may redesignate units throughout the year provided they notify the Department of Building Inspection in writing by the next business day following such redesignation and maintain the proper number of residential and tourist units at all times. The purpose of this provision is to simplify enforcement efforts while providing owner or operator with

reasonable and sufficient flexibility in designation and renting of rooms;

(7) The nature of services provided to the permanent residents and whether there has been an increase or decrease in the services so provided;

(8) A copy of the Daily Log, showing the number of units which are residential, tourist or vacant on October 1st, February 1st, May 1st and August 1st of the year of filing.

(b) **Notice of Annual Unit Usage Report.** On the day of filing, the owner or operator shall post a notice that a copy of the Annual Unit Usage Report submitted to the Department of Building Inspection is available for inspection between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday, which notice shall remain posted for 30 days.

(c) **Extension of Time for Filing.** Upon application by an owner or operator and upon showing good cause therefor, the Director of the Department of Building Inspection may grant one extension of time not to exceed 30 days for said filing.

(d) **Certificate of Annual Unit Usage Report.** After receipt of a completed Annual Unit Usage Report, the Department of Building Inspection shall issue a certified acknowledgment of receipt.

(e) **Renewal of Hotel License and Issuance of New Certificate of Use.** As of the effective date of this Chapter, no hotel license may be issued to any owner or operator of a hotel unless the owner or operator presents with his/her license application a certified acknowledgment of receipt from the Department of Building Inspection of the Annual Unit Usage Report for the upcoming year.

(f) **Insufficient Filing; Penalties.** The Director of the Department of Building Inspection authorized to assess a penalty as set forth below for insufficient filing, with interest on the penalty accruing at the rate of one and one-half percent per full month, compounded monthly from the date the penalty is due as stated in the Director's written notification below.

If the Director or the Director's designee determines that additional information is needed to make a determination, he shall send both the owner and operator a written request to furnish such information within 15 calendar days of the mailing of the written request. The letter shall state that if the requested information is not furnished in the time required, the residential and tourist units shall be presumed to be unchanged from the previous year and that the Director shall impose a $500 penalty for failure to furnish the additional information within the 15-day period. If the Director does not timely receive the information, the Director shall notify both the owner and operator, by mail, that the Director is imposing a $500 penalty which must be paid within 30 days of the mailing of the notification, and that interest on the penalty shall accrue from the expiration of the 30 days at the rate of one and one-half percent per full month, compounded monthly. The written notification shall state that if the penalty is not paid, a lien to secure the amount of the penalty, plus the accrued interest, will be recorded against the real property pursuant to the provisions of Section 41.20(d) of this Chapter.

(g) **Failure to File Annual Unit Usage Report; Penalties.** The Director of the Department of Building Inspection is authorized to assess penalties as set forth below for failure to file an Annual Unit Usage Report, with interest on penalties accruing at the rate of one and one-half percent

per full month, compounded monthly from the date the penalty is due as stated in the Director's notification below.

If the owner or operator fails to file an Annual Unit Usage Report, the Director or the Director's designee shall notify the owner and operator by registered or certified mail and shall post a notice informing the owner and operator that unless submission of the Annual Unit Usage Report and application for renewal of the hotel license is made within 15 calendar days of the mailing of the letter, the residential and tourist units shall be presumed to be unchanged from the previous year, and the Director shall impose a penalty of $300 per month of each month the annual report is not filed. If the Director does not receive the report the Director shall notify both the owner and operator, by mail that the Director is imposing the appropriate penalty, as prorated, which must be paid within 30 days of the mailing of the notification and that interest on the penalty shall accrue from the expiration of the 30 days at the rate of one and one-half percent per full month, compounded monthly. The written notification shall state that if the penalty is not paid, a lien to secure the amount of the penalty, plus the accrued interest, will be recorded against the real property pursuant to the provisions of Section 41.20(d) of this Chapter.

(h) **Appeal of Annual Usage Determination.** An owner or operator may appeal the annual unit usage determination by the Director of the Department of Building Inspection provided that there was no challenge pursuant to the provisions of subsection (i) below, and further provided that an appeal is filed within 20 calendar days from the date of annual unit usage determination. If an appeal is filed, a copy of the notice of appeal shall be posted by the owner or operator and a hearing pursuant to the provisions of Section 41.11(b) shall be scheduled.

(i) **Challenge; Standing; Statute of Limitation.** Any interested party may file a challenge to the information contained in the annual unit usage report filed by the owner or operator provided that such a challenge is in writing and is submitted within 30 calendar days from the date the report to the Department of Building Inspection is filed. Upon receipt of a challenge, a hearing pursuant to the provisions of Section 41.11(b) shall be scheduled. The owner or operator shall have the burden of proving by a preponderance of evidence that the information filed is correct. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.11. ADMINISTRATION.

(a) **Fees.** The owner or operator shall pay the following filing fees to the Department of Building Inspection to cover its costs of investigating and reporting on eligibility. See Section 333.2, Hotel Conversion Fee Schedule, Part II, Chapter 1 of the San Francisco Municipal Code (Building Code) for the applicable fees. The party that brings an unsuccessful challenge to a report pursuant to this Article shall be liable for the change in Section 333.2, Hotel Conversion Fee Schedule. Unsuccessful Challenge, Part II, Chapter 1 of the San Francisco Municipal Code (Building Code). Fees shall be waived for an individual who files an affidavit under penalty of perjury stating that he or she is an indigent person who cannot pay the filing fee without using money needed for the necessities of life.

SEE SAN FRANCISCO MUNICIPAL CODE (BUILDING CODE) SECTION 333.2 HOTEL CONVERSION FEE SCHEDULE

(b) **Hearing.**

(1) **Notice of Hearing.** Whenever a hearing is required or requested in this Chapter, the Director of the Department of Building Inspection shall, within 45 calendar days, notify the owner or operator of the date, time, place and nature of the hearing by registered or certified mail. The Director of the Department of Building Inspection shall appoint a hearing officer. Notice of such a hearing shall be posted by the Department of Building Inspection. The owner or operator shall state under oath at the hearing that the notice remained posted for at least 10 calendar days prior to the hearing. Said notice shall state that all permanent residents residing in the hotel may appear and testify at the public hearing, provided that the Department of Building Inspection is notified of such an intent 72 hours prior to the hearing date.
(2) **Pre-hearing Submission.** No less than three working days prior to any hearing, parties to the hearing shall submit written information to the Department of Building Inspection including, but not limited to, the following: the request or complaint, the statement of issues to be determined by the Hearing Officer; and a statement of the evidence upon which the request or complaint is based.
(3) **Hearing Procedure.** If more than one hearing for the same hotel is required, the Director of the Department of Building Inspection shall consolidate all of the appeals and challenges into one hearing; however, if a civil action has been filed pursuant to the provisions of Section 41.20(e) of the Chapter, all hearings on administrative complaints of unlawful conversions involving the same hotel shall be abated until such time as final judgment has been entered in the civil action; an interested party may file a complaint in intervention. The hearing shall be tape recorded. Any party to the appeal may, at his/her own expense, cause the hearing to be recorded by a certified court reporter. The hearing

officer is empowered to issue subpoenas upon application of the parties seven calendar days prior to the date of the hearing. During the hearing, evidence and testimony may be presented to the hearing officer. Parties to the hearing may be represented by counsel and have the right to cross-examine witnesses. All testimony shall be given under oath. Written decision and findings shall be rendered by the hearing officer within twenty working days of the hearing. Copies of the findings and decision shall be served upon the parties to the hearing by registered or certified mail. A notice that a copy of the findings and decisions is available for inspection between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday shall be posted by the owner or operator.

(4) **Administrative Review.** Unless otherwise expressly provided in this Chapter, any decision of the hearing officer shall be final unless a valid written appeal is filed with the Board of Permit Appeals within 15 days following the date of the hearing officer's written determination. Such an appeal may be taken by any interested party as defined by Section 41.4 (g) herein.

(c) **Inspection.** The Director of the Department of Building Inspection shall conduct, from time to time, on-site inspections of the daily logs, other supporting documents and units listed as vacant in the daily logs to determine if owner or operator has complied with the provisions of this Chapter. In addition, the Director of the Department of Building Inspection or the Director's designee shall conduct such an inspection as soon as practicable upon the request of a current or former occupant of the hotel. If upon such an inspection, the Director or Director's designee determines that an apparent violation of the provisions of this Chapter has occurred, he/she shall post a notice of apparent violation informing the permanent residents of the hotel thereof or shall

take action as set forth in Section 41.11(d) and (e) below. This notice shall remain posted until the Director of the Department of Building Inspection, or the Director's designee, determines that the hotel is no longer in violation of the provisions of this Chapter.

(d) **Criminal Penalties for Violations.** Any person or entity wilfully failing to maintain daily logs or provide and maintain receipts as provided in Sections 41.9(a) and (b) of this Chapter, or failing to post materials as provided in Sections 41.6(a), (c) and (f), 41.9(b), 41.10(b), (g) and (h), 41.11(b) (3), 41.12(b)(10) and 41.18(b) and (c) of this Chapter or wilfully providing false information in the daily logs shall be guilty of an infraction for the first such violation or a misdemeanor for any subsequent violation, and the complaint charging such violation shall specify whether the violation charged is a misdemeanor or an infraction.

If charged as an infraction, the penalty upon conviction therefor shall be not less than $100 or more than $500.

If charged as a misdemeanor, the penalty upon conviction therefor shall be a fine of not less than $500 or more than $1,000 or imprisonment in the county jail, not exceeding six months, or both fine and imprisonment.

Every day such violation shall continue shall be considered as a new offense.

For purposes of Sections 41.11(d) and (e), violation shall include, but not limited to, intentional disobedience, omission, failure or refusal to comply with any requirement imposed by the aforementioned Sections or with any notice or order of the Director of the Department of Building Inspection or the

Director of Public Works regarding a violation of this Chapter.

(e) **False Information Misdemeanor.** It shall be unlawful for an owner or operator to wilfully provide false information to the Director of the Department of Building Inspection or the Director's designees. Any owner or operator who files false information shall be guilty of a misdemeanor. Conviction of a misdemeanor hereunder shall be punishable by a fine of not more than $500 or by imprisonment in the County Jail for a period not to exceed six months, or by both. (f) The Director of the Department of Building Inspection may impose a penalty of $250 per violation for failure to maintain daily logs or for failure to provide receipts to occupants as required under Section 41.9 above and for failure to post materials as required under Sections 41.6(a), (c) and (f), 41.9(b), 41.10(b), (g) and (h), 41.11(b) (3), 41.12(b)(10), and 41.18(b) and (c). In order to impose such penalties, the Director shall notify both the owner and operator by certified mail that the Director is imposing the penalty or penalties, which must be paid within 30 days of the mailing of the notification. The written notification shall state that if the penalty is not paid, a lien to secure the amount of the penalty will be recorded against the real property pursuant to the provisions of Section 41.20(d) of this Chapter.

(g) **Costs of Enforcement.** The proceeds from the filing fees and civil fines assessed shall be used exclusively to cover the costs of investigation and enforcement of this ordinance by the City and County of San Francisco. The Director of the Department of Building Inspection shall annually report these costs to the Board of Supervisors and recommend adjustments thereof.

(h) **Inspection of Records.** The Department of Building Inspection shall maintain a file for each residential hotel which shall contain copies of all applications, exemptions, permits, reports and decisions filed pursuant to the provisions of this Chapter. All documents maintained in said files, except for all tax returns and documents specifically exempted from the California Public Record Act, shall be made available for public inspection and copying.

(i) **Promulgation of Rules and Regulations.** The Director of the Department of Building Inspection shall propose rules and regulations governing the appointment of an administrative officer and the administration and enforcement of this Chapter. After reasonable notice and opportunity to submit written comment are given, final rules and regulations shall be promulgated. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.12. PERMIT TO CONVERT.

(a) Any owner or operator, or his/her authorized agent, of a residential hotel may apply for a permit to convert one or more residential units by submitting an application and the required fee to the Central Permit Bureau.

(b) The permit application shall contain the following information:

(1) The name and address of the building in which the conversions are proposed; and

(2) The names and addresses of all owners or operators of said building; and

(3) A description of the proposed conversion including the nature of the conversion, the total number of units in the building, their current uses; and

(4) The room numbers and locations of the units to be converted; and

(5) Preliminary drawings showing the existing floor plans and proposed floor plans; and

(6) A description of the improvements or changes proposed to be constructed or installed and the tentative schedule for start of construction; and

(7) The current rental rates for each residential unit to be converted; and

(8) The length of tenancy of the permanent residents affected by the proposed conversion; and

(9) A statement regarding how one-for-one replacement of the units to be converted will be accomplished, including the proposed location of replacement housing if replacement is to be provided off- site; and

(10) A declaration under penalty of perjury from the owner or operator stating that he/she has complied with the provisions of Section 41.14(b) below and his/her filing of a permit to convert. On the same date of the filing of the application, a notice that an application to convert has been filed shall be posted until a decision is made on the application to convert.

(c) Upon receipt of a completed application to convert or demolish, the Department of Building Inspection shall send

the application to the Department of City Planning for review and shall mail notice of such application to interested community organizations and such other persons or organizations who have previously requested such notice in writing. The notice shall identify the hotel requesting the permit, the nature of the permit, the proposal to fulfill the replacement requirements of Section 41.13 herein, and the procedures for requesting a public hearing. Owner or operator shall post a notice informing permanent residents of such information.

(d) Any interested party may submit a written request within 15 days of the date notice is posted pursuant to subsection (c) above to the City Planning Commission to schedule and conduct a public hearing on the proposed conversion in order to solicit public opinion on whether to approve or deny a permit to convert or demolish residential units and to determine whether proposed replacement units are "comparable units" as defined in Section 41.4(b) herein. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.13. ONE-FOR-ONE REPLACEMENT.

(a) Prior to the issuance of a permit to convert, the owner or operator shall provide one-for-one replacement of the units to be converted by one of the following methods:

(1) Construct or cause to be constructed a comparable unit to be made available at comparable rent to replace each of the units to be converted; or

(2) Cause to be brought back into the housing market a comparable unit from any building which was not subject to the provisions of this Chapter; or

(3) Construct or cause to be constructed or rehabilitated apartment units for elderly, disabled or low-income persons or households which may be provided at a ratio of less than one-to-one; or construct or cause to be constructed transitional housing which may include emergency housing. The construction of any replacement housing under this subsection shall be evaluated by the City Planning Commission in accordance with the provisions of Section 303 of the City Planning Code. A notice of said City Planning Commission hearing shall be posted by the owner or operator 10 calendar days before the hearing; or

(4) Pay to the City and County of San Francisco an amount equal to 80 percent of the cost of construction of an equal number of comparable units plus site acquisition cost. All such payments shall go into a San Francisco Residential Hotel Preservation Fund Account. The Department of Real Estate shall determine this amount based upon two independent appraisals; or

(5) Contribute to a public entity or nonprofit organization, who will use the funds to construct comparable units, an amount at least equal to 80 percent of the cost of construction of an equal number of comparable units plus site acquisition cost. The Department of Real Estate shall determine this amount based upon two independent appraisals. In addition to compliance with all relevant City ordinances and regulations, the public entity or nonprofit organization and the housing development proposal of such public entity or nonprofit organization shall be subject to approval by the Mayor's Office of Housing.

(A) Such contribution shall be paid to the approved public entity or nonprofit organization in installments from an escrow account supervised by the Mayor's Office of Housing,

upon application by such public entity or nonprofit organization to the Mayor's Office of Housing, for specified expenditures, including but not limited to site acquisition costs, architect's fees, and construction costs; such payment shall be approved by the Mayor's Office of Housing prior to release of funds.

(B) The permit to convert shall be issued by the City when owner or operator deposits the full amount of funds in an escrow account described in subsection 41.13(a)(5)(A) above, or provides other form of non- refundable security acceptable to the City Attorney and the Mayor's Office of Housing.

(C) In the event that the public entity or nonprofit organization is unable to complete construction of the replacement housing, any unpaid amounts shall be released to the City. All such funds shall go into a San Francisco Residential Hotel Preservation Fund Account.

(b) Any displaced permanent resident relocated to replacement units provided under Subdivision (a) above shall be deemed to have continued his occupancy in the converted unit for the purpose of administering Subsection (k) of Section 37.2, San Francisco Administrative Code (San Francisco Rent Stabilization and Arbitration Ordinance).

(c) Any replacement units shall continue to be subject to the provisions of this Chapter.

(d) In the event that a completed application for a permit to convert is filed by a hotel owner or operator no later than the effective date of this amended Chapter, and such hotel owner or operator elects to provide one-for-one replacement of the residential units pursuant to Section 41.13(a) (4) or

Section 41.13(a) (5) herein, the hotel owner or operator shall be obligated to pay to the City and County of San Francisco an amount equal to 40 percent of the cost of construction of an equal number of comparable units plus site acquisition cost, provided that such hotel owner or operator shall pay such amount to the City or provide to the City security for such payment in a form satisfactory to the Mayor's Office of Housing and the City Attorney within 90 days following the date that the Department of Building Inspection determines that the application for a permit to convert is complete, or, if necessary, 10 days following final action, including any appeals, by the Planning Commission or appellate body, or 10 days following the Department of Real Estate's determination of such amount, whichever occurs latest. In the event that a hotel owner or operator elects to provide one-for-one replacement pursuant to Section 41.13(a)(2) or (a)(5) herein and the Mayor's Office of Housing has not approved a proposal or organization thereunder prior to the effective date of this amended Chapter, the Department of Building Inspection shall not reject such application as incomplete for such lack of information. If a hotel owner or operator applies for a permit to convert using the one-for-one replacement option described in 41.13(a)(2) or (a)(5) and the Mayor's Office of Housing does not approve a housing development proposal or a nonprofit organization, or such project fails to progress through no fault of the owner or operator, such applicant shall be permitted to provide one-for-one replacement pursuant to Section 41.13(a)(4) at 40 percent of the cost of construction of an equal number of comparable units plus site acquisition costs, provided that such applicant files the application under Section 41.13(a)(2) or (a)(5) no later than the effective date of this amended Chapter. The hotel owner or operator shall identify such housing proposal or nonprofit organization within 180 days of the effective date of this amended Chapter. In the event that the Mayor's Office

of Housing finds that the permit applicant has acted in good faith in seeking a project, the Mayor's Office of Housing may exercise its reasonable discretion to extend the provisions of this subsection for an additional 180 days. In the event that a project approved by the Mayor's Office of Housing fails to move forward through no fault of the permit applicant, the applicant may substitute another project within six months of being notified by the Mayor's Office of Housing of a failure of the prior project to move forward. The Mayor's Office of Housing may extend this period for an additional 180 days to identify such new proposal. The City shall issue a permit to convert under this subsection 41.13(d) only if the hotel owner or operator has either paid the 40-percent in lieu fee to the City pursuant to Section 41.13(a)(4) herein or complied with the requirements of Sections 41.13(a)(2) or (a)(5) as applicable. In the event that a hotel owner or operator has not complied with any of these requirements and the City has not issued a permit to convert or if the Mayor's Office of Housing has not found the hotel owner or operator has acted in good faith in seeking a project pursuant to subsections 41.13(a)(2) or (a)(5) or this subsection, no later than 180 days following the effective date of this amended Chapter, or such later date as herein provided, this Subsection 41.13(d) shall no longer be applicable, City shall refund any amounts deposited as security pursuant to the terms herein, and such hotel owner or operator shall comply with all applicable terms of this Chapter.

(e) When a residential unit is approved for conversion to another use pursuant to the provisions of Subsection 41.13(a)(2), (a)(4) or (a)(5) above, such unit shall not be deemed to be reconverted into a residential unit regardless of any interim uses after payment as set forth in Subsections 41.13(a)(2), (a)(4) or (a)(5). (Added by Ord. 121-90, App.

4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.14. MANDATORY DENIAL OF PERMIT TO CONVERT.

A permit to convert shall be denied by Director of the Department of Building Inspection if:

(a) The requirements of Sections 41.12 or 41.13, above, have not been fully complied with;

(b) The application is incomplete or contains incorrect information;

(c) An applicant has committed unlawful action as defined in this Chapter within 12 months previous to the issuance for a permit to convert;

(d) The proposed conversion or the use to which the unit would be converted is not permitted by the City Planning Code. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.15. APPROVAL AND ISSUANCE OF PERMIT TO CONVERT.

The Director of the Department of Building Inspection shall issue a permit to convert, provided that:

(a) The requirements of Section 41.12 have been met;

(b) Evidence of compliance with the requirements of Section 41.13 has been submitted. Satisfactory evidence of compliance may be:

(1) A certification of final completion or permit of occupancy on the replacement housing; or

(2) A receipt from the City Treasurer that the in-lieu payment determined by the Department of Real Estate has been received; and

(3) Evidence of compliance with the requirements of Section 41.17 herein.

(c) The proposed conversion or the use to which the unit would be converted is permitted by the City Planning Code.

(d) Concurrent with the issuance of a permit to convert, the Director of the Department of Building Inspection shall issue a new certificate of use which shall state the newly certified number of residential units and tourist units. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.16. APPEAL OF DENIAL OR APPROVAL OF PERMIT TO CONVERT.

(a) Denial or approval of a permit application may be appealed to the Board of Permit Appeals, pursuant to Sections 8 et seq. Part III of the San Francisco Municipal Code.

(b) The owner or operator shall submit a statement under the penalty of perjury that he has notified all the affected permanent residents of his appeal and of the date, time and place of the hearing before the Board of Permit Appeals, seven calendar days prior to the scheduled hearing.

(c) The appellant shall have the burden of proving that the determination of the Director of the Department of Building Inspection is invalid. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.17. RIGHTS OF PERMANENT RESIDENTS.

(a) To apply for a permit to convert, an owner or operator of the hotel shall do the following:

(1) Any interested community organization and all permanent residents residing in said building at the time of an application for a permit to convert and thereafter shall be timely informed of all public hearings and administrative decisions concerning said conversion; said notice shall be posted by the owner or operator;

(2) A permanent resident has the right to occupy his/her residential unit for 60 calendar days from the issuance of the permit to convert;

(3) Owner or operator shall offer a permanent resident available comparable units in the building, or to any replacement housing provided pursuant to Subsection 41.13(a)(1) or (2);

(4) All displaced permanent residents are entitled to relocation assistance as provided for in subsection (b) below;

(5) Seven calendar days prior to the filing of an application for a permit to convert, the owner or operator shall notify, in writing, by personal service, or registered or certified mail, every permanent resident affected by the proposed conversion of his/her intent to convert designated units;

(6) The notification required by Subsection (5) above shall also inform the permanent residents of their rights under Subsections (1) through (4) above.

(b) **Relocation Assistance**.

(1) A permanent resident, who as a result of the conversion of his/her unit must relocate off site, shall be reimbursed the actual moving expenses not to exceed $300 or may consent to be moved by the owner or operator.

(2) A displaced permanent resident shall have the right of first refusal for the rental or leasing of replacement units, if any, provided pursuant to the provisions of Sections 41.13(a)(1) or 41.13(a)(2).

(3) A permanent resident displaced by partially completed conversion under the provisions of Section 41.7(c) shall be entitled to a displacement allowance of $1,000 per displaced person. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.18. DEMOLITION.

(a) This section shall apply only to demolition of residential hotel buildings pursuant to an abatement order of the Director of Public Works or the Superior Court of the State of California, or demolition necessitated by major fires, natural causes or accidents where the cost of repair exceeds 50 percent of the replacement value of the building.

(b) Upon submission of an application for a demolition permit, the owner or operator shall post a copy of said application.

(c) Upon notification by the Central Permit Bureau that a demolition permit has been issued, the owner or operator shall post a notice explaining the procedure for challenging the issuance of the demolition permit to the Board of Permit Appeals.

(d) When issued a demolition permit, the owner or operator shall provide a written notice of the demolition within 10 calendar days of issuance of the permit to each residential permanent resident. Each permanent resident shall be notified in writing of his/her rights to relocation assistance and to occupy the same unit for a period of up to 60 days after issuance of the demolition permit.

(e) The subsequent issuance of a building permit for construction on the demolished site shall be conditioned on the owner or operator's agreement to replace, on a one-for-one basis, the demolished residential units as required by the provisions of Section 41.13. No building permit shall be issued until owner or operator complies with the provisions of Section 41.13.

(f) The conditions for issuance of a demolition permit set forth in subsection (e) above shall be recorded by the owner at the time of issuance of the demolition permit in order to provide notice of said conditions to all subsequent purchasers and interested parties. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.19. TEMPORARY CHANGE OF OCCUPANCY.

(a) **Temporary Change of Occupancy.**

(1) A tourist unit may be rented to a permanent resident, until voluntary vacation of that unit by the

permanent resident or upon eviction for cause, without changing the legal status of that unit as a tourist unit.

(2) A permanent resident may be relocated for up to 21 days to another unit in the residential hotel for purposes of complying with the Building Code requirements imposed by the UMB Seismic Retrofit Ordinance, Ordinance No. 219-92, without changing the designation of the unit.

(3) A residential unit which is vacant at any time during the period commencing on May 1st and ending on September 30th annually may be rented as a tourist unit, provided that (i) the residential unit was vacant due to voluntary vacation of a permanent resident or was vacant due to lawful eviction for cause after the permanent resident was accorded all the rights guaranteed by State and local laws during his/her tenancy, (ii) the daily log shows that the residential unit was legally occupied for at least 50 percent of the period commencing on October 1st and ending on April 30th of the previous year, unless owner or operator can produce evidence to the Department of Building Inspection explaining such vacancy to the satisfaction of the Department of Building Inspection, including but not limited to such factors as repair or rehabilitation work performed in the unit or good-faith efforts to rent the unit at fair market value; and (iii) the residential unit shall immediately revert to residential use upon application of a prospective permanent resident.

25-percent Limit.

However, at no time during the period commencing on May 1st and ending on September 30th may an owner or operator rent for nonresidential use or tourist use more than 25 percent of the hotel's total residential units unless the owner or operator can demonstrate that (i) the requirements

of 41.19(a)(3) above are met, (ii) good-faith efforts were made to rent such units to prospective permanent residents at fair market value for comparable units and that such efforts failed and (iii) the owner or operator has not committed unlawful action as defined in this Chapter within 12 months prior to this request. Owners or operators who seek to exceed this limit must request a hearing pursuant to Section 41.11(b) above and the decision whether to permit owners or operators to exceed this limit is within the discretion of the hearing officer.

(b) **Special Requirements for Hearings on Tourist Season Rental of Residential Units.** Where an owner or operator seeks a hearing in order to exceed the limit on tourist season rental of vacant residential units pursuant to Section 41.19(a)(3), the requirements of 41.11(b)(1), (b)(2) and (b)(3) above shall be applicable except as specifically modified or enlarged herein:

(1) **Notice of Hearing.** Notice of hearing as provided in Section 41.11(b)(1) above shall be given within 15 calendar days. The notice requirements for the owner or operator shall also be applicable to any interested party who has submitted a prior written request to the Director of the Department of Building Inspection to be notified of such hearings.

(2) **Time of Hearing.** The hearing shall be held within 30 days of the submission of the owner or operator's written request for hearing.

(3) **Burden of Proof.** Burden of proof is on the owner or operator.

(4) **Interested Party.** Any interested party shall be deemed a "party to the hearing" for purposes of Section 41.11(b)(1).

(5) **Determination of the Hearing Officer.** Based upon the evidence presented at the hearing, conducted in accordance with Section 41.11(b)(3) above, the hearing officer shall make findings as to (i) whether the residential unit was vacant due to voluntary vacation of a permanent resident or was vacant due to lawful eviction, (ii) whether the residential unit was occupied for at least 50 percent of the period commencing on October 1st and ending on April 30th of the previous year, (iii) whether the owner or operator has committed unlawful action under this Chapter within 12 months prior to this request, and (iv) whether the owner or operator made good-faith efforts to rent vacant residential units to prospective permanent residents at no more than fair market value for a comparable unit during the tourist season and yet was unable to secure such rentals. Good-faith efforts shall include, but not be limited to, advertising the availability of the residential units to the public. In determining fair market value of the residential units, the hearing officer shall consider any data on rental of comparable units, as defined in Section 41.4(b) herein.

(6) **Decision.** The hearing officer shall render a written decision and findings within 10 working days of the hearing.

(7) **Effect of Decision.** The hearing officer's decision shall remain in effect for the tourist season for which the owner or operator requested the hearing. If the owner or operator wishes to exceed the 25 percent limit during any subsequent tourist season, a new written request for hearing

must be submitted to the Director of the Department of Building Inspection.

(8) **Construction.** The purpose of this Section 41.19(b) is to supplement or modify provisions of Section 41.11(b) (1) through (b)(3). Unless otherwise specifically modified, all provisions of Sections 41.11(b)(1) through (b)(3) are deemed applicable to hearings concerning the tourist season limitation on rental of vacant residential units.

(c) **Winter Rentals.** A residential unit which is vacant at any time during the period commencing on October 1st and ending on April 30th annually may be rented as a tourist unit, provided that:

(1) Such owner or operator has been permitted to rent residential units as tourist units in excess of 25 percent of the residential units pursuant to Section 41.19(a)(3) above;

(2) The owner or operator has not committed unlawful action as defined in this Chapter within 12 months prior to the time of this request;

(3) A residential hotel may not rent in excess of 33 percent of the total number of residential units or 20 residential units, whichever is less, pursuant to this subsection;

(4) Applicants to temporarily convert residential units pursuant to this subsection shall submit applications to the Department of Public Works, in accordance with rules and regulations promulgated by the Department of Public Works;

(5) A maximum of 60 residential units may be approved per year to be rented as tourist units or

nonresidential units pursuant to this Subsection 41.19(c). In the event that the number of such applications exceeds 60 residential units, the Department of Public Works shall establish a lottery system based on priority ranking where preference shall be accorded to residential hotel owners who have been eligible more frequently than other hotel owners for temporary conversion pursuant to Subsection 41.19(a)(3) above;

(6) Such nonresidential use is permitted by the zoning for such residential hotel; and

(7) No application for such temporary conversion shall be approved by the Department of Public Works to fill the unused portion of the 60 residential unit limitation for the previous year. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 219-92, App. 7/14/92; Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.20. UNLAWFUL CONVERSION; REMEDIES; FINES.

a) **Unlawful Actions.** It shall be unlawful to:

(1) Change the use of, or to eliminate a residential hotel unit or to demolish a residential hotel unit except pursuant to a lawful abatement order, without first obtaining a permit to convert in accordance with the provisions of this Chapter;

(2) Rent any residential unit for a term of tenancy less than seven days except as permitted by Section 41.19 of this Chapter;

(3) Offer for rent for nonresidential use or tourist use a residential unit except as permitted by this Chapter.

(b) **Hearing for Complaints of Unlawful Conversions.** Upon the filing of a complaint by an interested party that an unlawful conversion has occurred and payment of the required fee, the Director of the Department of Building Inspection shall schedule a hearing pursuant to the provisions of Section 41.11(b). The complainant shall bear the burden of proving that a unit has been unlawfully converted. The hearing officer shall consider, among others, the following factors in determining whether a conversion has occurred:

(1) Shortening of the term of an existing tenancy without the prior approval of the permanent resident;

(2) Reduction of the basic services provided to a residential unit intended to lead to conversion. For the purpose of this section, basic services are defined as access to common areas and facilities, food service, housekeeping services and security;

(3) Repeated failure to comply with order of the Department of Building Inspection or the Department of Public Health to correct code violations with intent to cause the permanent residents to voluntarily vacate the premises;

(4) Repeated citations by the Director of the Department of Building Inspection or the Department of Public Health for code violations;

(5) Offer of the residential units for nonresidential use or tourist use except as permitted in this Chapter;

(6) Eviction or attempts to evict a permanent resident from a residential hotel on grounds other than those specified in Sections 37.9(a)(1) through 37.9(a)(8) of the San Francisco Administrative Code except where a permit to convert has been issued;

(7) Repeated posting by the Director of the Department of Building Inspection of notices of apparent violations of this Chapter pursuant to Section 41.11(c) above.

(c) **Civil Penalties.** Where the hearing officer finds that an unlawful conversion has occurred, the Director of the Department of Building Inspection shall impose a civil penalty of three times the daily rate per day for each unlawfully converted unit from the day the complaint is filed until such time as the unit reverts to its authorized use. The daily rate shall be the rate unlawfully charged by the hotel owner or operator to the occupants of the unlawfully converted unit. The Director may also impose penalties upon the owner or operator of the hotel to reimburse City or complainant for the costs of enforcement, including reasonable attorneys' fees, of this Chapter. The hearing officer's decision shall notify the parties of this penalty provision and shall state that the Director of the Department of Building Inspection is authorized to impose the appropriate penalty by written notification to both the owner and operator, requesting payment within 30 days. If the penalty imposed is not paid, a lien to secure the amount of the penalty will be recorded against the real property pursuant to the provisions of Section 41.20(d) of this Chapter.

(d) **Lien Proceedings.** If any penalty imposed pursuant to Sections 41.10(d), 41.10(f), 41.11(f) or 41.20(c) is not received within the required time period, the Director of the Department of Building Inspection shall initiate proceedings

under Article XX of Chapter 10 of the San Francisco Administrative Code to make the penalty, plus accrued interest, a lien against the real property regulated under this Chapter. Except for the release of lien recording fee authorized by Administrative Code Sec. 10.237, all sums collected by the Tax Collector pursuant to this ordinance shall be held in trust by the Treasurer and distributed as provided in Section 41.8(e) of this Chapter.

(e) **Civil Action** An interested party may institute a civil proceeding for injunctive relief and damages. The Director of the Department of Building Inspection may institute a civil proceeding for injunctive relief. Counsel for the interested party shall notify the City Attorney's office of the City and County of San Francisco of any action filed pursuant to this section. In determining whether an unlawful conversion has occurred, the court may consider, among other factors, those enumerated in Section 41.20(b) of this Chapter. The interested party instituting a civil proceeding, or the City suing to enforce this Chapter, if prevailing parties, shall be entitled to the costs of enforcing this Chapter, including reasonable attorney's fees, pursuant to an order of the Court. (Added by Ord. 121-90 App. 4/12/90; amended by Ord. 322-00, File No. 001917, App. 12/28/2000; Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.21. ANNUAL REVIEW OF RESIDENTIAL HOTEL STATUS.

(a) The Department of Building Inspection shall prepare and submit to the Board of Supervisors an annual status report containing the following:

(1) Current data on the number of residential hotels and the number of residential units in each of the residential

hotels in the City and County of San Francisco, including, to the extent feasible, information regarding rents, services provided, and violations of the City's codes;

(2) Current data on the number of residential hotel units converted pursuant to a permit to convert;

(3) Current data on the number of hotel units demolished or eliminated due to code abatement proceedings and fire;

(4) Current data on the number of residential hotel units illegally converted;

(5) Current data on the number of replacement housing units rehabilitated or constructed;

(6) A summary of the enforcement efforts by all City agencies responsible for the administration of this Chapter; and

(7) An evaluation of the workability and effectiveness of the permitted temporary change of occupancy procedures and winter rentals in Section 41.19 herein; and

(8) A report on expenditures from the San Francisco Residential Hotel Preservation Fund Account.

(b) The Economic and Social Policy Committee of the Board of Supervisors shall conduct a hearing on the annual report submitted by the Department of Building Inspection and shall recommend appropriate actions to be taken by the Board of Supervisors.

(c) The Department of Building Inspection should establish a San Francisco Residential Hotel Operators Advisory Committee composed of:

- 3 members nominated by the San Francisco Hotel Association (for-profit operators);

- 3 members nominated by the Golden Gate Hotel Association (for-profit operators);

- 2 members nominated by the Council of Community Housing Organizations (nonprofit hotel operators);

- Deputy Mayor for Housing.

The committee shall meet no less than once every three months to advise the Mayor's Office of Housing on matters including, but not limited to:

(1) Proposed revisions to this ordinance;

(2) Programs that various City agencies (i.e. Mayor's Office of Housing, Department of Social Services, etc.) should develop to assist the City's residential hotel operators;

(3) Any state or federal laws the City should support, oppose or seek to revise that impact residential hotel operators;

(4) Any new City, State or Federal programs the City shall encourage that would provide financial or technical support or assistance to San Francisco Residential Hotel Operators. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.22. CONSTRUCTION.

(a) Nothing in this Chapter may be construed to supersede any other lawfully enacted ordinance of the City and County of San Francisco, except that definitions provided in this Chapter shall govern the enforcement of this Chapter.

(b) Clauses of this Chapter are declared to be severable and if any provision or clause of this Chapter or the application thereof is held to be unconstitutional or to be otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other provisions of this Chapter. (Added by Ord. 121-90, App. 4/12/90)

(3)

No. 04-340

Supreme Court, U.S.
FILED
NOV 12 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T & R INVESTMENT CORP.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant review to decide whether a federal court should apply the Full Faith and Credit Act, 28 U.S.C. § 1738, to preclude relitigation of a regulatory takings claim after a state court has issued a final judgment on the merits of the identical claim.

2. Whether this Court should grant review to decide whether heightened scrutiny under *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* applies to legislation requiring the payment of a development impact fee that applies equally to a broad class of property owners.

CORRECTION OF MISSTATEMENT IN PETITION OF QUESTIONS PRESENTED

Astonishingly, petitioners' first question fails to include any reference to the Full Faith and Credit Act, 28 U.S.C. § 1738, the primary basis for the Ninth Circuit's application of issue preclusion to petitioners' takings claims.

Petitioners' first question also assumes that petitioners involuntarily filed their takings claims in state court. To the contrary, petitioners initially filed their takings claims in federal court. Following judgment against them in the district court, petitioners, for the first time, asked the Ninth Circuit to reverse and send the entire case to state court under the abstention doctrine of *Railroad Commission v. Pullman*, 312 U.S. 496 (1941). The Ninth Circuit ordered the district court to abstain from adjudicating petitioners' facial takings claim. Accordingly, petitioners did not involuntarily litigate their takings claims in state court.

Finally, the prologue to petitioners' questions for review misrepresents that the City's ordinance "prohibited hotels from continuing their historic, duly-licensed operation as hotels." In fact the opposite is true – the ordinance allowed the continuation of the historic use of the affected hotels.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORRECTION OF MISTATEMENT IN PETITION OF QUESTIONS PRESENTED	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. Statement of Facts	3
1. The Hotel Conversion Ordinance	3
2. The San Remo Hotel	5
B. Procedural History	8
1. *San Remo I*	8
2. *San Remo II*	10
3. *San Remo III*	11
REASONS THE PETITION SHOULD BE DENIED	12
I. PETITIONERS' TAKINGS CLAIMS ARE TIME-BARRED	12
II. THERE IS NO CONFLICT REGARDING THE APPLICATION OF THE FULL FAITH AND CREDIT ACT TO BAR RELITIGATION OF TAKINGS CLAIMS IN FEDERAL COURT WHERE THE STATE COURT HAS ALREADY ADJUDICATED IDENTICAL CLAIMS	13

TABLE OF CONTENTS – Continued

Page

III. THERE IS NO CONFLICT REGARDING THE APPLICATION OF A DEFERENTIAL STANDARD OF REVIEW TO GENERALLY APPLICABLE REGULATIONS CHALLENGED UNDER THE SUBSTANTIALLY ADVANCE TEST 18

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 14

Allen v. McCurry, 449 U.S. 90 (1980) 3, 13

Atlas Corp. v. United States, 895 F.2d 745 (Fed. Cir. 1990) 19

Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704 (9th Cir. 1992) 12

Baker v. General Motors Corp., 522 U.S. 222 (1998) 13

Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, 721 N.E.2d 971 (N.Y. 1999), *cert. denied*, 529 U.S. 1094 (2000) 23

Chevron USA, Inc. v. Cayetano, 224 F.3d 1030 (9th Cir. 2000), *cert. denied*, 532 U.S. 942 (2001), *aff'd sub nom., Chevron USA, Inc. v. Bronster*, 363 F.3d 846 (9th Cir. 2004), *cert. granted sub nom., Lingle v. Chevron U.S.A., Inc.*, No. 04-163 19

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 2, 21, 22

Clajon Production Corp. v. Petera, 70 F.3d 1566 (10th Cir. 1995) 22

Commercial Builders of Northern Cal. v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992) 21

Commonwealth Edison Co. v. United States, 271 F.3d 1327 (Fed. Cir. 2001) 19

Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995), *aff'd after remand*, 136 F.3d 1219 (9th Cir. 1998) 2, 15, 18

TABLE OF AUTHORITIES – Continued

Page

Dolan v. City of Tigard, 512 U.S. 374 (1994) 2, 14, 20

Eastern Enterprises, Inc. v. Apfel, 524 U.S. 498 (1998) 2, 19

Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299 (11th Cir. 1992) 17

Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275 (4th Cir. 1998) 17

Garneau v. City of Seattle, 147 F.3d 802 (9th Cir. 1998) 21

Golden Gate Hotel Ass'n v. City and County of San Francisco, 18 F.3d 1482 (9th Cir. 1994), *aff'd after remand*, 76 F.3d 386 (9th Cir. 1996), *cert. denied*, 519 U.S. 808 ..... 5, 8, 9

Hensler v. City of Glendale, 8 Cal.4th 1 (1994) 14

Hotel & Motel Ass'n v. City of Oakland, 344 F.3d 959 (9th Cir. 2003) 21

Jennings v. Caddo Parish School Bd., 531 F.2d 1331 (5th Cir. 1976) 17

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 12

Kitt v. United States, 277 F.3d 1330, *mod. on other grounds*, 288 F.3d 1355 (Fed. Cir. 2002) 19

Levald, Inc. v. City of Palm Desert, 998 F.2d 680 (9th Cir. 1993) 12

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 3

Migra v. Warren City Sch. Dist. Bd. of Education, 465 U.S. 75 (1984) 13

TABLE OF AUTHORITIES – Continued

Page

New Port Largo, Inc. v. Monroe County, 95 F.3d 1084 (11th Cir. 1996), *cert. denied*, 521 U.S. 1121 22

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 2, 14, 20

Peduto v. City of North Wildwood, 878 F.2d 725 (3d Cir. 1989) 17

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 14, 18

Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) 21

Railroad Commission v. Pullman, 312 U.S. 496 (1941) 15

San Remo Hotel v. City and County of San Francisco, 145 F.3d 1095 (9th Cir. 1998) 8, 9, 10, 15, 16

San Remo Hotel v. City and County of San Francisco, 27 Cal.4th 643 (2002) 3, 14

San Remo Hotel v. City and County of San Francisco, 364 F.3d 1088 (9th Cir. 2004) 11, 15

Santini v. Connecticut Hazardous Waste Management Service, 342 F.3d 118 (2d Cir. 2003), *cert. denied on other grounds*, 125 S.Ct. 104 (2004) 15, 16, 17, 23

Seawall Associates v. City of New York, 74 N.Y.2d 92, 542 N.E.2d 1059 (1989) 22, 23

Texas Manufactured Hous. Ass'n v. City of Nederland, 101 F.3d 1095 (5th Cir. 1996), *cert. denied*, 521 U.S. 1112 22

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 21

TABLE OF AUTHORITIES – Continued

Page

Wilkinson v. Pitkin County, 142 F.3d 1319 (10th Cir. 1998) 17

Wilson v. Garcia, 471 U.S. 261 (1985) 12

Yee v. City of Escondido, 503 U.S. 519 (1992) 22

STATUTES

28 United States Code
§ 1738 ..... *passim*

San Francisco Administrative Code
§ 41.2 3
§ 41.3 ..... 3, 5
§ 41.4 4
§ 41.6 ..... 4, 5
§§ 41.11-15 4
§ 41.12 4
§ 41.13 ..... 4, 5, 7
§ 41.19 ..... 4, 6, 22

OTHER

JERRY F. SCHIMMEL, SAN REMO HOTEL 1906-1976, Historical Resource Manual 5-16 (1998) 6

STATEMENT OF THE CASE

The petition should be denied because the decision below is consistent with the decisions of this Court and raises no important question of law. Petitioners filed this action challenging the City's Residential Hotel Unit Conversion and Demolition Ordinance ("HCO") 12 years after the City enacted the ordinance. Under the applicable one-year statute of limitations, the district court found that this action is time-barred. Because the case was properly dismissed on this independent ground, the Court should decline review of the questions presented in the petition.

Petitioners also seek a determination that a takings claimant may litigate its takings claims in state court, and if unsuccessful in that forum, relitigate the identical takings claims in federal court. Petitioners contend that the federal court should give their takings claims de novo review, even where the facts and applicable law of the federal and state claims are identical.

Not only is there no conflict on this issue, but it is difficult to conceive of a more wasteful and unfair system for resolving a legal dispute. Granting every takings claimant two bites at the judicial apple would further burden cash-strapped public agencies with duplicative litigation and deluge the federal courts with local zoning disputes. In the Full Faith and Credit Act, 28 U.S.C. § 1738, a central component of the doctrine of federalism, Congress determined that federal courts should not serve as general courts of appeal for state court actions. The petition ignores the inefficiencies that would result if all takings claimants were awarded two separate opportunities to litigate an identical claim.

The petition is also remarkable for its failure to cite either the Full Faith and Credit Act or *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) (*"Dodd I"*), 136 F.3d 1219 (9th Cir. 1998) (*"Dodd II"*), the cornerstones of the Ninth Circuit's opinion. Where petitioners conceal the central legal basis for the lower court decision and fail even to cite federal statute and caselaw that undermine their position, this Court cannot reasonably expect that granting review here would lead to a fair and thorough development of the issues.

Petitioners further contend that the lower courts incorrectly declined to apply heightened judicial scrutiny to the HCO under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Review on this question would be unwarranted because there is no conflict on this issue. The Takings Clause does not apply to a generalized obligation to pay money, such as the impact fee at issue. *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring and dissenting); *id.* at 554-55 (Breyer, J., dissenting). Even if the Court disagrees, in *Nollan*, *Dolan*, and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), this Court drew a sharp distinction between unique, adjudicatory exactions imposed on individual property owners and generally applicable, legislative regulation. In the former, the Court held, a higher level of judicial scrutiny may be justified. In the latter case, however, the Court indicated that deferential review is the applicable standard. The HCO is a generally applicable legislative regulation. In applying deferential review to the HCO, the lower courts were faithful to this Court's consistent pronouncements on this issue. The Court should deny review.

A. Statement of Facts.

The Petition misrepresents the facts. The correct facts are as set forth in the decision of the California Supreme Court in *San Remo Hotel v. City and County of San Francisco*, 27 Cal.4th 643 (2002) (*"San Remo II"*). Appendix to Petition ("App.") E at 108a-121a.[1]

1. The Hotel Conversion Ordinance.

In the years preceding the enactment of the HCO, the City faced a growing loss of rental housing. HCO, S.F. Admin. Code § 41.3.[2] One major reason for this loss was the increasing conversion of residential hotel units to tourist use. § 41.3. After years of study, in 1979, the City adopted the temporary HCO, and in 1981, adopted a permanent ordinance:

> to benefit the general public by minimizing adverse impacts on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition. § 41.2.

---

[1] Petitioners contend that because this case was decided on a motion to dismiss, the Court should accept the facts petitioners allege in their complaint as true. Petition at 2 n.1. To the contrary, under the Full Faith and Credit Act, the California Supreme Court's findings of fact are binding on the federal courts. *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (collateral estoppel prevents federal court relitigation of issue of fact adjudicated in state court); *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120-22 (1992) (in regulatory takings case, Supreme Court defers to factual findings of state court).

[2] Unless otherwise indicated, all statutory references are to the HCO. The text of the HCO is set forth in Appendix F to the Petition.

The HCO requires residential hotel owners to continue the historic use of their hotels. At the time of its enactment in 1981, the HCO required each hotel in San Francisco to report the number of residential and tourist units in the hotel as of September 23, 1979. §§ 41.4(q), 41.6. Based on the information provided by the hotel, the City issued a Certificate of Use, which specified the legal use of the property and certified the number of residential and tourist units in the hotel. § 41.6(d).

The HCO balances the rights of residential hotel owners and tenants by allowing owners unlimited tourist use of rooms that were used for tourists in 1979, and tourist use of residential rooms during the summer tourist season, May through September. Residential rooms must revert to residential use during the winter, however, when tourism falls off. § 41.19(a)(2).

The City's Department of Building Inspection ("DBI") administers the HCO. §§ 41.11-15. While DBI is authorized to maintain records of residential hotels and to enforce the ordinance, DBI has no discretion to apply the HCO to a residential hotel on a case-by-case basis. App. E at 137a-138a.

Under the HCO, an owner can convert residential hotel units to non-residential use if the owner replaces the converted residential units. An owner may provide replacement housing by building new units. Alternatively, to assist in the construction of replacement units, an owner may contribute an in lieu fee to the City's Residential Hotel Preservation Fund equal to the land cost and a fixed percentage of the construction cost of the converted units. §§ 41.12-13. The formula for the in lieu fee applies equally to every residential hotel subject to the HCO. *Id.* DBI has

no discretion to vary the amount of replacement housing provided or the amount of the in lieu fee. *Id.* The HCO applies to 500 residential hotels containing more than 18,000 units. § 41.3(d); App. E 139a n.12, 150a.

In May 1990, the City reenacted the HCO "in slightly modified form." *Golden Gate Hotel Ass'n v. City and County of San Francisco*, 18 F.3d 1482, 1484 (9th Cir. 1994), *aff'd after remand*, 76 F.3d 386 (9th Cir. 1996), *cert. denied*, 519 U.S. 808. The amendment increased the replacement fee from 40% of construction costs to 80%. § 41.13(a)(5). The 1990 HCO also imposed further restrictions on rental of tourist units in the summer. In order to rent more than 25% of residential rooms to tourists in the summer, a hotel was required to make good faith efforts to rent residential rooms during the winter. § 41.19; App. E at 111a.

2. The San Remo Hotel.

In 1981, petitioners reported to the City that the San Remo had 61 residential units and 0 tourist units on September 23, 1979.[3] App. E at 114a. Based on petitioners' own report, the City confirmed the number of residential units in the San Remo in a Certificate of Use. *Id.* Petitioners did not challenge the City's classification under the procedures provided by the HCO, and the Certificate of Use became final. *Id.*; *see also* § 41.6(f).

Petitioners misrepresent that the HCO prevented the continuation of the San Remo's historic use as a tourist

[3] In the mid 1980's, petitioners notified DBI that the San Remo in fact contained 62 residential units rather than 61.

hotel. Contrary to petitioners' claim that the San Remo "has been operated as a tourist hotel since the 1950s," the San Remo's historic use was primarily, if not exclusively, as a residential hotel. *See* JERRY F. SCHIMMEL, SAN REMO HOTEL 1906-1976, HISTORICAL RESOURCE MANUAL 5-16 (1998). As of September 1979, the San Remo Hotel was in 100% residential use. App. E at 114a. The California Supreme Court and the district court rejected petitioners' claim that petitioners' own 100% residential use designation was a mistake. App. E at 152a-153a n.17; App. D at 56a-57a. Accordingly, the HCO required petitioners merely to continue their historic use of the San Remo as a residential hotel, but relaxed even that requirement for the five summer months of each year, allowing greater tourist use than had recently occurred.[4]

Petitioners further misrepresent that the 1990 amendments to the HCO "severely restricted petitioners' operation of the hotel." Pet. at 3. In fact, the change had no effect on the San Remo. Petitioners applied for and

[4] Petitioners' statement that the San Remo "was fully-licensed as a tourist hotel" in 1971 is misleading. Before the City enacted the HCO in 1979, DBI did not distinguish between tourist and residential hotel units: DBI licensed both uses as "hotel." Similarly, when DBI issued a new license to petitioners in 1976, the license did not distinguish between tourist and residential hotel use. Petitioners' statement that the City "collected hotel taxes based on the tourist use of the hotel," insofar as it creates the impression that the San Remo was primarily a tourist hotel, is also misleading. Hotel taxes were due for any temporary tourist use of residential rooms. The HCO allowed summer tourist rentals of the San Remo's 62 residential rooms, as long as the rooms reverted to residential use during the winter. § 41.19(a)(2).

received approval from the City for 100% summer tourist rentals for each year following the 1990 amendments until petitioners converted the San Remo to a tourist hotel in 1993. App. D at 78a n.13; App. E at 116a. The 1990 HCO also allowed owners who filed an application for a permit to convert before the June 1990 effective date of the 1990 HCO to elect the 40% replacement housing payment rather than the new 80% fee. § 41.13(d); App. E at 110a n.3.

On May 11, 1990, petitioners invoked the 40% grandfathering provision of the 1990 HCO and filed an application under the HCO for a permit to convert all 62 residential units to permanent tourist use. App. D at 59a. Under the HCO's formula for the in lieu fee, petitioners were required to pay $567,000 to replace 40% of the affordable housing lost as a result of the conversion.[5]

Although petitioners had failed to pay the replacement housing fee, they nevertheless converted the San Remo to permanent tourist use in September 1993 and sued the City. *See* App. D at 62a. On December 11, 1996,

[5] Petitioners misrepresent that the fee resulted from an action of the San Francisco Planning Commission in an adjudicatory proceeding. To the contrary, the City's legislature, in adopting the HCO, imposed the fee by legislated formula. The Planning Commission merely recited the fee in its approval of the San Remo's conversion under the City Planning Code, a separate ordinance. As the California Supreme Court held: "[T]he dissent's claim that 'the planning commission chose to . . . exact a $567,000 fee' misrepresents the facts. . . . In their application for a conditional use permit, plaintiffs – who had already applied for a conversion permit under the HCO – assured the planning commission that they would comply with the HCO. The commission incorporated that assurance as a condition of the [conditional use] permit, *but did not itself assess any fee*." App. E at 129a, emphasis original, citations omitted.

petitioners paid the fee under protest. *Id.* at 67a. On March 6, 1997, the City issued a conversion permit under the HCO allowing petitioners to use all 62 of their rooms for permanent tourist use.[6]

B. Procedural History.

The procedural history of this case presents an example of blatant forum-shopping. Each time petitioners faced rejection of their takings claims, they managed to resurrect their claims in another forum. In this federal court action, San Remo seeks not a second bite at the apple, but a third.

1. *San Remo I.*

In May 1993, petitioners filed this action in U.S. District Court *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998) (*"San Remo I"*) and related it to another case before Judge John Vukasin, *Golden Gate Hotel Ass'n v. City and County of San Francisco*. *See Golden Gate*, 18 F.3d 1482; App. D at 61a. Petitioners did so because Judge Vukasin expressed the view early in the *Golden Gate* case that the HCO is unconstitutional.

On September 16, 1993, Judge Vukasin found the HCO unconstitutional on its face in *Golden Gate*. At the same time, Judge Vukasin granted petitioners' motion for

[6] Although petitioners had converted the San Remo to a permanent tourist hotel in 1993, the City did not require interest on the fee for the 3½-year period during which the San Remo had been operating illegally as a tourist hotel.

a preliminary injunction enjoining the City from enforcing the HCO to prevent year-round tourist use of all 62 rooms in the San Remo. App. D at 62a.

Subsequent developments in the courts completely eroded the basis for Judge Vukasin's preliminary injunction. *Id.* at 63a. In March 1994, the Ninth Circuit vacated, reversed, and remanded Judge Vukasin's decision in *Golden Gate*, ordering the district court to consider the statute of limitations. *Id.*; *Golden Gate*, 18 F.3d at 1487. Judge Vukasin had died in the interim, and, on remand, *Golden Gate* was assigned to District Judge D. Lowell Jensen. Judge Jensen entered judgment for the City in *Golden Gate*, finding that the facial takings challenge to the HCO was barred by the one-year statute of limitations. The Ninth Circuit affirmed. 76 F.3d 386.

On August 26, 1997, Judge Jensen rejected each of Judge Vukasin's earlier rulings in the instant case, granted summary judgment to the City, and dissolved the preliminary injunction. *See San Remo I*, 145 F.3d at 1100; App. D at 66a. Petitioners appealed the district court's ruling. Despite having chosen the federal forum to prosecute their takings claim, petitioners argued on appeal, for the first time, that the district court should have declined to entertain their takings claims and abstained in favor of a state court adjudication. *See San Remo I*, 145 F.3d at 1104-05. Despite expressing "some sympathy" for the City's claim that petitioners were forum-shopping, and noting that "as a matter of the responsible conduct of litigation, a party desiring to raise abstention will normally seek it first in the district court," the Ninth Circuit nevertheless ordered abstention as to petitioners' facial takings claim. *Id.* The Ninth Circuit concluded that petitioners' as-applied takings claim was not ripe for

adjudication in federal court. *Id.* at 1102. The court affirmed the judgment for the City as to petitioners' due process and equal protection challenges to the HCO. *Id.* at 1101, 1103.

2. *San Remo II.*

Following *San Remo I*, petitioners filed their facial and as-applied takings claims in the California Superior Court. App. D at 67a. The Superior Court granted judgment to the City on petitioners' takings claims. The Court of Appeal reversed. The California Supreme Court granted review. *Id.* at 68a. On March 4, 2002, the Supreme Court issued its decision in favor of the City on all issues. *Id.*; App. D.

The California Supreme Court rejected petitioners' claim that the HCO's requirement that they pay a fee to convert to a permanent tourist hotel "does not substantially advance legitimate state interests." App. D at 144a-155a. The Court held that: (1) "housing replacement fees assessed under the HCO are not subject to [heightened] scrutiny," *id.* at 140a; (2) petitioners were required to show that there is no "reasonable relationship" between the conversion of the San Remo to permanent tourist hotel use and the mitigation fee, *id.* at 141a-142a & n.13; and (3) because the fee is "measured by the resulting loss of housing units, . . . [it] was thus reasonably related to the impacts of plaintiffs' proposed change in use" and did not effect a taking. *Id.* at 155a. Although the court stated that it was not deciding petitioners' federal takings claims, the court applied the federal law of takings throughout its opinion and emphasized that California and federal takings law are coextensive. *Id.* at 130a-131a.

3. *San Remo III.*

On June 4, 2002, petitioners refiled their takings claims in the district court. In the second version of this federal action, petitioners alleged takings claims identical to those they had asserted in state court. App. D. at 96a. ("In this case, San Remo is arguing a violation of the Takings Clause based on the exact same facts and circumstances argued before the state courts."). The district court dismissed petitioners' facial and as-applied claims as time-barred, with the exception of petitioners' as-applied takings challenge to the City Planning Code.[7] The district court further concluded that it was required to defer to the rulings of the California Supreme Court under the Act. Accordingly, the court applied issue preclusion to bar each of petitioners' takings claims. *Id.* at 104a-105a, App. C at 50a. Although it did not reach the merits, the district court indicated that, were it to rule on the merits, it would agree with the California Supreme Court and find in favor of the City, on the ground that the HCO "substantially advances a legitimate government interest" and does not effect a taking under any other takings test. App. D at 101a-103a.

Finding that San Remo's state and federal takings claims were identical, the Ninth Circuit affirmed under the Full Faith and Credit Act and the issue preclusion doctrine. *San Remo Hotel v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004) ("*San Remo III*") App. A at 17a-21a. The Ninth Circuit did not reach the statute of limitations issue.

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[7] The petition challenges the HCO only. It does not raise a takings challenge to the Planning Code.

REASONS THE PETITION SHOULD BE DENIED

I. PETITIONERS' TAKINGS CLAIMS ARE TIME-BARRED.

Because this action is time-barred, the Court need not reach the questions raised in the petition. At the time petitioners filed this action in 1993, the applicable statute of limitations in California for claims against local government agencies under the Takings Clause of the Fifth Amendment was one year. *Wilson v. Garcia*, 471 U.S. 261, 280 (1985) (O'Connor, J., dissenting); *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992). The City enacted the HCO in 1981. A facial takings challenge to legislation accrues immediately upon enactment of the statute. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987). Accordingly, petitioners' action, filed in 1993, was 11 years too late. Even if the enactment date of the HCO is deemed to be the 1990 amendments, petitioners' facial challenge, filed three years later, was untimely.

The as-applied challenge is likewise time-barred. The district court concluded that petitioners' challenge to the HCO was in fact a facial challenge because petitioners attacked the basic policy underlying the HCO. *See also*, App. C at 77a (plaintiffs allege that both 1981 and 1990 HCOs require plaintiffs to "bear the public burden of housing the poor"); App. D at 82a n.14; App. E at 147a n.16 ("[P]laintiffs' challenge [is] not to the housing replacement fee, or to any other exaction made as a condition of permit approval, but to the City's underlying reasons for restricting residential hotel conversion."). That policy had been consistently applicable to the San Remo since 1981. *See, e.g., Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993) (where alleged injury arises solely from existence of

statute itself, challenge is facial). Accordingly, petitioners' takings claim, filed under the guise of an as-applied claim, was also filed 11 years too late.

II. THERE IS NO CONFLICT REGARDING THE APPLICATION OF THE FULL FAITH AND CREDIT ACT TO BAR RELITIGATION OF TAKINGS CLAIMS IN FEDERAL COURT WHERE THE STATE COURT HAS ALREADY ADJUDICATED IDENTICAL CLAIMS.

The Ninth Circuit applied the Full Faith and Credit Act to bar petitioners' takings claims. That decision is fully consistent with the decisions of this Court and federal statute. The Full Faith and Credit Act requires federal courts to give both issue and claim preclusive effect to earlier state court judgments. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 83-85 (1984); *see also Allen v. McCurry*, 449 U.S. at 94 (Claim and issue preclusion "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.").

Under issue preclusion, "an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on a same or a different claim." *Baker v. General Motors Corp.*, 522 U.S. 222, 233 n.5 (1998). Contrary to petitioners' argument, a takings claimant has no absolute entitlement to a federal forum for their claims:

> [N]othing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state court judgment or decision when the state court, acting within its

> proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights. *Allen*, 449 U.S. at 103-04, footnotes and citation omitted.

Here, the Ninth Circuit correctly found that petitioners' federal takings claims are barred under the issue preclusion doctrine. First, petitioners' state and federal claims are identical. In both state and federal courts, petitioners alleged that the HCO works a taking under the "substantially advance" test of *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). In applying this test, petitioners argued, courts should impose heightened scrutiny on the City's ordinance under *Nollan* and *Dolan*. In addition, petitioners alleged that the HCO works a taking under the "mutli-pronged test established by *Penn Central Trans. Co. v. New York City,* 438 U.S. 104 (1978)." Excerpts of Record ("ER") 43; *see also* ER 178; *compare* ER 43, 45-47 (Second Am. Cplt. in federal court) *with* Supp. Excerpts of Record 57-62 (Second Am. Cplt. in state court).

Second, the applicable law is identical. The *San Remo II* Court observed that it construes the Takings Clauses of the United States and California Constitutions "congruently." App. E at 130a; *see also Hensler v. City of Glendale*, 8 Cal.4th 1, 9 n.4 (1994) ("Our conclusion that the prerequisites to an inverse condemnation action arising out of a regulatory taking do not deny landowners any rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution applies equally to rights claimed under article I, section 19 [Takings Clause of California Constitution]"). The district court and the Ninth Circuit also found that California and federal substantive takings law is equivalent. App. D at 91a-94a; App. A at 19a-20a.

Petitioners contend that the Ninth Circuit's application of issue preclusion to takings claims previously litigated in state court conflicts with the decisions of other circuit courts. No split exists to warrant review.

Petitioners principally rely on the recent Second Circuit opinion in *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118 (2d Cir. 2003), *cert. denied on other grounds*, 125 S.Ct. 104 (2004). *Santini* concludes that issue preclusion does not apply to federal takings claims following involuntary litigation of the same claims in state court. *Id.* at 128. The *Santini* Court, like petitioners here, did not consider, *or even mention*, the Full Faith and Credit Act. Because *Santini* did not address the Act, it is not in direct conflict with the Ninth Circuit decisions in *Dodd* and *San Remo III*.

Moreover, *Santini* does not conflict with *San Remo III* because, unlike the claimant in *Santini*, petitioners here were not involuntary litigants in state court. On appeal from the district court's judgment in *San Remo I*, *petitioners* asked the Ninth Circuit to reverse and order the district court to send their facial takings claim to state court under *Pullman*, over the City's objection. *San Remo I*, 145 F.3d at 1104-05. Petitioners stated in their Opening Brief in the Ninth Circuit in *San Remo I*: "THIS COURT SHOULD ORDER ABSTENTION UNDER *PULLMAN* TO ALLOW THE STATE COURTS TO RESOLVE DISPUTED ISSUES OF STATE LAW." Appellant's Opening Brief filed Jan. 13, 1997 at 18. Petitioners argued that the case met all of the elements for *Pullman* abstention, *id.* at 20-21,

and that abstention was "required." *Id.* at 19.[8] Accordingly, petitioners could have litigated their takings claims in the federal forum had they not voluntarily moved the case to state court over the City's objection. To allow petitioners to relitigate in this Court the same takings claim raising the same issues of law and fact that the California Supreme Court has already rejected would unfairly penalize the City and reward petitioners for forum-shopping.

Whether petitioners' litigation in state court was voluntary or involuntarily is ultimately inconsequential, however, because issue preclusion applies regardless of the reason for the prior state court litigation. Whether the claimant voluntarily initiates the action in state court is not an element of the Full Faith and Credit Act. It makes no difference that the plaintiff's forum for litigating the claim was imposed upon him.

> There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all. *Allen*, 449 U.S. at 104.

This Court need not grant review to reverse *Santini*, where that court failed to address relevant federal statute.[9]

[8] In the Ninth Circuit, a challenge to regulation on the basis that it fails to substantially advance legitimate state interests on its face may be filed in federal court in the first instance, without exhausting the state remedy. *San Remo I*, 145 F.3d at 1102.

[9] Because the government was the prevailing party in *Santini*, it had no incentive to petition for rehearing or rehearing en banc to request that the court consider the Act, nor did the government have any interest in raising this issue in a petitioning for certiorari.

Indeed, no court has followed the poorly reasoned *Santini* opinion. With the exception of *Santini*, every circuit court that has addressed issue preclusion agrees with the Ninth Circuit. *See Peduto v. City of North Wildwood*, 878 F.2d 725, 729 (3d Cir. 1989) ("Where a party has been afforded a full and fair hearing in state court, section 1983 does not allow relitigation of the same issues in federal court 'simply because the state court's decision may have been erroneous.'"); *Wilkinson v. Pitkin County Bd. of County Commissioners*, 142 F.3d 1319, 1324 (10th Cir. 1998) ("We conclude the *Williamson* ripeness requirement is insufficient to preclude application of res judicata and collateral estoppel principles in this case.").[10]

Petitioners misrepresent that the Fourth, Fifth, and Eleventh Circuits "agree" with *Santini*, relying on *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 282-84 (4th Cir. 1998), *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1303-09 (11th Cir. 1992), and *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331, 1332 (5th Cir. 1976). Petitioners are wrong again. Similar to the Ninth Circuit, the courts in each of these cases declined to apply *claim preclusion* to bar litigation of federal takings claims in federal court following state court litigation. The cases do not, however, address the Full Faith and Credit Act's requirement that federal courts apply *issue preclusion* to state court adjudications of takings claims. Thus, they do not conflict with the rule in the Third, Ninth, and Tenth Circuits.

[10] *Santini* is not only poorly reasoned, it is also a recent decision. This Court should deny review to allow the federal circuit courts the opportunity to apply the Full Faith and Credit Act to takings claims previously litigated in state court.

And contrary to petitioners' contention, takings claimants are not denied a federal forum for their takings claims in every instance. Issue preclusion bars a federal takings claim only where the federal claim is identical to a state claim litigated to a final judgment in state court. Petitioners fail to point out that where the federal and state claims differ, the federal court will adjudicate issues that the state court has not already decided. *Dodd I*, 59 F.3d at 852; *Dodd II*, 136 F.3d at 1228 (Because Oregon takings law does not recognize *Penn Central* multi-factor test for a taking, claimant allowed to litigate issue in federal court).

Petitioners provide no rationale for permitting regulatory takings claimants two bites at the apple, while limiting other constitutional claimants to a single opportunity to litigate. The policy petitioners advocate would flood the already overburdened federal courts with takings litigation. Finally, the requirement that local governments litigate takings claims twice, in two different court systems, would impose a crippling financial burden on already severely stressed local public agencies, compelling the reallocation of resources from vital services, such as police and fire protection, education, and health care. It is hard to imagine a more wasteful policy.

III. THERE IS NO CONFLICT REGARDING THE APPLICATION OF A DEFERENTIAL STANDARD OF REVIEW TO GENERALLY APPLICABLE REGULATIONS CHALLENGED UNDER THE SUBSTANTIALLY ADVANCE TEST.

Petitioners also request review of the lower court's conclusion that deferential review applies under a substantially advance challenge to the HCO. The Ninth Circuit's holding is fully consistent with the rulings of this

Court and every federal circuit and state supreme court to address the issue. There is no conflict on this issue, and review is not warranted.

Although the legitimacy of the substantially advance test is uncertain, *see Eastern Enterprises*, 524 U.S. at 545 (Kennedy, J., concurring and dissenting); *id.* at 554 (Breyer, J., dissenting),[11] in any event, five Justices of this Court found that the Takings Clause of the United States Constitution simply does not apply to fees or other obligations to pay money. *Id.* at 540 (Kennedy, J., concurring and dissenting) (monetary obligation is not "specific property interest" subject to takings analysis); *id.* at 554-55 (Breyer, J., dissenting, joined by Stevens, Souter, Ginsburg, JJ.) (same); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339-40 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1096 (2002) ("[F]ive justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings. We agree with the prevailing view that we are obligated to follow the views of that majority."); *Kitt v. United States*, 277 F.3d 1330, 1336-37, *mod. on other grounds*, 288 F.3d 1355 (Fed. Cir. 2002) (same); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990) ("Requiring money to be spent is not a taking of property.").

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[11] The validity of the substantially advance test as a takings test independent of the due process clause is before the Court in *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000), *cert. denied*, 532 U.S. 942 (2001), *aff'd sub nom., Chevron USA, Inc. v. Bronster*, 363 F.3d 846 (9th Cir. 2004), *cert. granted sub nom., Lingle v. Chevron U.S.A., Inc.*, No. 04-163 (Oct. 12, 2004). Given that no conflict exists regarding the standard of judicial review of generally applicable regulations, the Court need not grant review to decide the legitimacy of the substantially advance test.

Moreover, "heightened scrutiny" is limited to "exactions" imposed on a case-by-case basis – where the government conditions approval on the owner's dedication of land to the public to offset the impact of the proposed project. *Nollan*, 483 U.S. at 841; *Dolan*, 512 U.S. at 385-86. This Court and the lower federal courts are unanimous that deferential review applies to legislative regulations and conditions of approval that do not require the dedication of a possessory interest in land. The rationale for this rule is twofold. First, while ad hoc conditions of approval involve discretionary decision-making on individual projects, ordinary zoning does not; rather, it "involves essentially legislative determinations classifying entire areas of the city." *Dolan*, 512 U.S. at 385. As to legislative land use classifications, such as the HCO, the Court has indicated that a deferential standard continues to apply. *Nollan*, 483 U.S. at 834-35; *Dolan*, 512 U.S. at 385.

Second, heightened scrutiny is appropriate for exactions of real property interests because such regulations resemble physical takings. *See Nollan*, 483 U.S. at 831; *id.* at 841 ("We are inclined to be particularly careful about the adjective ["substantial"] where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective."). Dedications of land, however, are entirely different from the ordinary regulation of land use. *See id.* at 834-35 (citing cases involving land use regulation for the proposition that "a broad range of governmental purposes and regulations" of land use have been upheld); *see also Dolan*, 512 U.S. at 385 ("The sort of land use regulations

discussed in [*Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926), *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), and *Agins*] . . . differ in [that] the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city."). The Court confirmed that point of view most recently in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1992), where the Court held that heightened scrutiny is not appropriate for regulations that do not require the property owner to dedicate a physical interest in land to the public. The Court stated:

> [W]e have not extended the rough proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use. 526 U.S. at 702.

Heightened scrutiny does not apply here because the HCO does not effect a physical taking.

The circuit courts are unanimous that heightened scrutiny is limited to ad hoc exactions of physical interests in land. *Commercial Builders of Northern Cal. v. City of Sacramento*, 941 F.2d 872, 874-75 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992) (applying deferential test rather than heightened scrutiny to uphold generally applicable development impact fee); *Hotel & Motel Assoc. of Oakland v. City of Oakland*, 344 F.3d 959, 968 (9th Cir. 2003) (applying deferential "reasonable relationship" test to reject "substantially advances" challenge to habitability requirements for hotels); *Garneau v. City of Seattle*, 147 F.3d 802, 811-812 (9th Cir. 1998); *id.* at 820 (Williams, J., concurring) (noting history of judicial deference to generally applicable fees "resulting from legislative . . .

processes"); *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1088 (11th Cir. 1996), *cert. denied*, 521 U.S. 1121 (1997) (heightened scrutiny not applicable to zoning regulation that does not compel a physical invasion); *Texas Manufactured Hous. Ass'n v. City of Nederland*, 101 F.3d 1095, 1105 (5th Cir. 1996), *cert. denied*, 521 U.S. 1112 (1997) (rejecting application of *Nollan* to legislation regulating location of manufactured homes); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) (heightened scrutiny inapplicable to hunting license scheme because regulation not a "physical taking or its equivalent").[12]

Petitioners rely on *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059 (1989), to suggest that courts are divided on the standard of judicial review of legislative regulation for takings. In that case, the New York court struck down an ordinance that required owners of residential hotels to rent units to homeless persons. The court found that the ordinance forced rentals and thus effected a physical taking. The court also applied heightened scrutiny to find that the ordinance failed to substantially advance legitimate state interests. 542 N.E.2d at 1068-69. Petitioners' reliance on *Seawall* is misplaced.

The HCO does not require landlords to rent any units. Vacancy does not violate the ordinance. *See* § 41.19. Accordingly, the HCO does not compel property owners to submit to occupation of their property by others and does not constitute a physical taking. *See Yee*

[12] The only federal decision after *Del Monte Dunes* to apply heightened scrutiny to a regulation that does not exact a possessory interest in land is *Lingle v. Chevron*, scheduled for hearing this term. *See* n.11, *supra*, at p. 19.

v. City of Escondido, 503 U.S. 519, 527 (1992) (finding that a physical taking requires forced occupation). The district court agreed. App. 102a. Moreover, insofar as the *Seawall* Court applied heightened scrutiny to a legislative regulation of general application, the New York Court of Appeals expressly overruled *Seawall* in *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 721 N.E.2d 971, 975 (N.Y. 1999), *cert. denied*, 529 U.S. 1094 (2000).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: November 12, 2004

Respectfully submitted,

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(6)

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In the Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T&R INVESTMENT CORP.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Introduction 1

I. THE CONFLICT ON THE ISSUE PRECLUSION/*WILLIAMSON COUNTY* QUESTION IS UNDENIABLE AND CANNOT BE RESOLVED WITHOUT THIS COURT'S GUIDANCE 3

II. THERE IS A NATION-WIDE CONFLICT ON WHETHER LEGISLATIVE EXACTIONS ARE SUBJECT TO HEIGHTENED SCRUTINY AND THAT CONFLICT CANNOT BE RESOLVED IN *LINGLE* 4

III. THERE IS NO PROCEDURAL BARRIER TO THIS COURT'S CONSIDERATION OF THE ISSUES IN THIS CASE 8

A. The Statute of Limitations Is Not a Barrier To Review of the Issue Preclusion and Legislative Exaction Issues 8

B. The Petition Properly Stated the Facts and, in Any Event, the Undisputed Facts Permit this Court to Completely Resolve the Legislative Exaction Issue 9

Conclusion 10

TABLE OF AUTHORITIES

Cases

Armstrong v. United States, 364 U.S. 40 (1960) . 7, 10

Commonwealth Edison Co. v. United States, 271 F.3d 1327 (Fed. Cir. 2001) 6

DLX, Inc. v. Kentucky, 381 F.3d 511 (6th Cir. 2004) 3

Dolan v. City of Tigard, 512 U.S. 374 (1994) 7

Eastern Enterprises, Inc. v. Apfel, 524 U.S. 498 (1998) 6

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 3

Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978 (9th Cir. 2002) 6

Franconia Associates v. United States, 536 U.S. 129 (2002) 9

Franklin County Convention Facilities Authority v. American Premier Underwriters, Inc., 240 F.3d 534 (6th Cir. 2001) 6

Kitt v. United States, 277 F.3d 1330, modified 288 F.3d 1355 (Fed Cir. 2002) 6

Lingle v. Chevron, No. 04-163 . . . . . *passim*

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 7

Matsushita Electric Indus. Co. v. Epstein, 516 U.S. 367 (1996) 8

Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003) . . . 4

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 7, 8

Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page, 165 Ill.2d 25, 649 N.E.2d 384 (1995) 5

Parking Ass'n of Georgia v. City of Atlanta, 264 Ga. 764, 450 S.E.2d 200 (1994) 4

San Remo Hotel v. City and County of San Francisco, 145 F.3d 1095 (9th Cir. 1998) (*San Remo I*) . . 8, 9

San Remo Hotel v. City and County of San Francisco, 27 Cal.4th 643, 41 P.3d 87, 117 Cal.Rptr.2d 269 (2002) (*San Remo II*) 7

San Remo Hotel, L.P. v. City and County of San Francisco, 364 F.3d 1088 (9th Cir. 2004) (*San Remo III*) 3, 4, 10

Santini v. Connecticut Hazardous Waste Management Service, 342 F.3d 118 (2003) 3, 4

Seawall Associates v. City of New York, 74 N.Y.2d 92, 542 N.E.2d 1059 (1989) 7

Town of Flower Mound v. Stafford Estates Ltd., 47 Tex. Sup. Ct. J. 497, 135 S.W.3d 620 (2004) 4, 7

Travis v. County of Santa Cruz, 33 Cal.4th 757, 94 P.2d 538 (2004) 9

Trimen Development Co. v. King County, 124 Wash.2d 261, 877 P.2d 187 (1994) 5

United States v. Morrison, 529 U.S. 598 (2000) . . . 6

Williamson County Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 1, 2, 3, 4

Statutory Provisions

HCO § 41.2 10
HCO § 41.3(m) 10
HCO § 41.4(n) 10
HCO § 41.4(q) 10

Other Authorities

Faus, Richard, *Exactions, Impact Fees, and Dedications – Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 Stetson L. Rev. 675 (2000) 5

INTRODUCTION

The City and County of San Francisco's Brief in Opposition does not deny the importance of the two questions presented by the Petition. Nor could it do so. The lower courts have long struggled with both questions, but have arrived at impasses that only this Court can resolve.

The first unresolved question is whether the federal courts have a duty to reach the merits of federal Takings claims after plaintiffs exhaust potential state law remedies. Because of the decision in *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), that question is nothing less than whether the rights secured by the Takings Clause of the Fifth Amendment are protected by the federal courts. See Petition at 6-10.

The second unresolved question is whether the federal courts have a duty to provide meaningful constitutional review of exactions imposed by legislation. Because that question invokes the fundamental conflict between the rights of the minority and the political power wielded by the majority, this Court has long recognized its constitutional importance – most recently by granting the petition for certiorari in *Lingle v. Chevron*, No. 04-163.

Lingle, however, offers only the opportunity to resolve a part of the constitutional issue: whether economic regulations imposed by legislation are subject to heightened scrutiny. *Lingle* does not address the more intractable question of whether legislative exactions – with their unique risk that the government will leverage its regulatory power to extract fees – should be given the safe haven of deferential judicial review.

Unlike *Lingle*, this case *does* involve a legislative exaction. Accordingly, this Petition provides the Court with an opportunity to form the legal framework that will resolve the conflicting interests of the local and state governments that

urged review in *Lingle* and the millions of property owners who urge review as *amici curiae* here.[1]

The City wants only the safe haven for legislative exactions that would be created if this Court resolves *Lingle* and denies certiorari in this case. That is, of course, why the City asked this Court to grant certiorari in *Lingle* and deny this Petition. But, the City offers no principled reason for its requests. It does not answer the Petition's argument that the exaction issue has long been ready for this Court's review or offer any reason to believe that piecemeal review of the issues could serve any purpose. Instead, the City claims that there is no conflict. As shown below, however, the lower courts emphatically disagree.

There is one final reason that this Court should grant the Petition. Because of the enormous efforts required to ripen a Takings claim under *Williamson County,* few other Takings plaintiffs will ever reach this Court. Indeed, this is one of first cases to comply with *Williamson County*'s procedural gauntlet, and petitioners' 14-year odyssey to reach this Court will, if unsuccessful, stop all but the most foolish from attempting to do so again. For that reason, many lower courts, petitioners, and millions of individuals and businesses that will suffer because local and state governments choose to exact funds from the few, rather than tax the many, all ask this Court to state the law.

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[1] Amici include the Chamber of Commerce of the United States, which represents three million businesses and professional organizations, the National Association of Realtors, which represents one million members, and the National Association of Home Builders, which represents more than 215,000 members.

I. THE CONFLICT ON THE ISSUE PRECLUSION/*WILLIAMSON COUNTY* QUESTION IS UNDENIABLE AND CANNOT BE RESOLVED WITHOUT THIS COURT'S GUIDANCE

The City's argument that the first issue presents no conflict in the lower courts is wishful thinking. In this case, the Ninth Circuit flatly stated that its rule "expressly conflicts" with the Second Circuit's rule. *San Remo Hotel v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004) ("*San Remo III*"), App. B-15a, discussing *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 128 (2003), cert. denied, 125 S. Ct. 104 (2004). The Second Circuit also expressly acknowledged the conflict and its disagreement with the Ninth Circuit. *Santini*, 342 F.3d at 128 ("we part ways with most of our sister circuits"); see also *DLX, Inc. v. Kentucky*, 381 F.3d 511, 522-523 (6th Cir. 2004) (discussing conflict between Second and Ninth Circuits).

The Second Circuit did not disagree with the Ninth Circuit lightly. Instead, after carefully considering the competing principles of finality and fairness, the Second Circuit adopted the same solution that this Court adopted in the analogous situation of *Pullman* abstention. *Santini*, 342 F.3d at 128, quoting *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415 (1964). The Second Circuit reached that conclusion to avoid the collision between the normal rules of preclusion and the ripeness requirements established by this Court in *Williamson County*:

> It would be both ironic and unfair if the very procedure that the Supreme Court required [Takings plaintiffs] to follow before bringing a Fifth Amendment takings claim – a state court-inverse condemnation action – also precluded [them] from

ever bringing a Fifth Amendment takings claim. *Santini*, 342 F.3d at 130.

The Ninth Circuit's view is equally entrenched. Indeed, in this case, the panel did not state that it disagreed with *Santini*, but only that it was "compelled to follow" existing Ninth Circuit precedent. *San Remo III*, App. 15a; see *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (panel must follow circuit precedent until overruled by en banc panel or Supreme Court).

The stakes on this issue are high: if the Ninth Circuit's rule is correct, Takings claims can never be considered on the merits in federal court. Petition at 6-10. That was surely not this Court's intention when it announced the ripeness requirements in *Williamson County*. This Court should grant the Petition to resolve this threshold issue of Takings law.

II. THERE IS A NATION-WIDE CONFLICT ON WHETHER LEGISLATIVE EXACTIONS ARE SUBJECT TO HEIGHTENED SCRUTINY AND THAT CONFLICT CANNOT BE RESOLVED IN *LINGLE*

The City's argument that the lower courts have already resolved the Petition's second question is also wishful thinking. In fact, the conflict with the Ninth Circuit is pointed. Contrary to the City's claim that all courts agree with the Ninth Circuit's decision to apply deferential scrutiny, the highest courts in five states, as well as federal courts in two circuits, have applied heightened scrutiny to legislative exactions. Petition at 11 n. 5.

The most recent example is the Texas Supreme Court decision in *Town of Flower Mound v. Stafford Estates Ltd.*, 47 Tex. Sup. Ct. J. 497, 135 S.W.3d 620, 640-642 (2004). But, the conflict already existed ten years ago, when it was recognized by two Justices of this Court. *Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995)

(Justices Thomas and O'Connor, dissenting from denial of certiorari). In the subsequent ten years, the conflict has only grown larger. Compare cases cited in Petition at 11 n. 5 with cases cited at 12 n. 6; see also Faus, Richard, *Exactions, Impact Fees, and Dedications - Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 Stetson L. Rev. 675, 704 (2000) (characterizing it as a "nationwide split of authority").

While the City now claims that there is no conflict, it saw things quite differently in an amicus curiae brief urging this Court to grant the petition for certiorari in *Lingle v. Chevron USA, Inc.*, No. 04-163.[2] That amicus brief argued that circuit and state courts have issued conflicting opinions about whether legislation is subject to heightened scrutiny under the Takings Clause. In fact, that amicus brief even cited two of the same cases cited by the Petition for the proposition that the state supreme courts of Illinois and Washington apply heightened scrutiny to legislative exactions. League of California Cities' Amicus Brief at 12-13, citing *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 649 N.E.2d 384, 389 (1995); *Trimen Development Co. v. King County*, 877 P.2d 187, 194 (1994).

This Court cannot resolve that conflict in *Lingle*. The issue in *Lingle* is whether a Hawaii law imposing rent control on gasoline stations is subject to heightened scrutiny. Unlike the Hotel Ordinance in this case, the Hawaii law did not provide for the payment of an exaction to avoid the regulation. Thus, this Court cannot reach the issue of whether heightened scrutiny is proper for legislative exactions

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[2] The brief was filed by the League of California Cities, which includes San Francisco, and it was signed by the same Deputy City Attorney who signed the City's Brief in Opposition in this case.

in *Lingle*. Unless this Petition is granted, the conflict in the lower courts will persist.

On the merits, the City argues that heightened scrutiny should never be applied to generally applicable legislation even if it imposes an exaction. Brief in Opposition at 18-23.[3] The City's argument recalls the ones it made in *Lingle*: this Court should apply deferential scrutiny to legislation because any other course would return to the *Lochner* era. League of California Cities' Amicus Brief at 5-11.

The City's argument ignores the fundamental difference between the Takings Clause and the Due Process Clause. The Due Process Clause prohibits certain governmental actions. But, the Takings Clause does not prohibit governmental actions, it only requires the government to pay a price, i.e., just compensation. Unlike the Due Process test, the purpose of the substantial advancement test under the Takings Clause

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[3] The City also claims that the Takings Clause "simply does not apply" to monetary exactions. Brief in Opposition at 19, citing *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498 (1998). The City makes that claim by adding Justice Kennedy's vote to the votes of the four dissenting Justices. But, a one-justice concurrence plus a dissent with four votes does not equal a holding. *United States v. Morrison*, 529 U.S. 598, 624 (2000) (adding up votes in concurring and dissenting opinions is "simply not the way that reasoned constitutional adjudication proceeds"). The City also relies on cases from the Federal Circuit. Brief in Opposition at 19, citing *Kitt v. United States*, 277 F.3d 1330, modified 288 F.3d 1355 (Fed Cir. 2002); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001). Those cases ignore this Court's holding in *Morrison*. Even the Ninth Circuit has rejected the City's interpretation of *Eastern Enterprises*. *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 982-983 (9th Cir. 2002); accord *Franklin County Convention Facilities Authority v. American Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001) ("We conclude that *Eastern Enterprises* has no precedential effect . . . because no single rationale was agreed upon by the Court.").

is not to distinguish legitimate government regulations from illegitimate regulations. Instead, the purpose is to distinguish between regulations that involve "the adjustment of rights for the public good" (which do not require compensation) from regulations that force "'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'". *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 107, 111, 542 N.E.2d 1059, 1065-1066, 1068, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The City and the lower courts in this case believe that the political process is sufficient to protect against the dangers of governmental leveraging that was the basis for this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). But, as pointed out by the Texas Supreme Court and Justice Brown's dissent in the California Supreme Court, the political process responds to the will of the majority, which often has little or no regard for the rights of a small group of property owners, like the owners of the hotels in San Francisco that are regulated by the Hotel Ordinance. Petition at 15, quoting *Town of Flower Mound*, 135 S.W.3d at 641 and *San Remo v. City and County of San Francisco*, 27 Cal.4th 643 (2002), App. E-175a-176a.

Those conflicting views, and the deeply-held constitutional issues they address, cannot be answered by a doctrine that allows local and state governments to avoid meaningful judicial scrutiny merely by changing the mechanisms they use to impose exactions. This case provides an apt example. If exactions imposed by "legislation" are insulated from judicial reversal, property owners will lose their constitutional protection under the Fifth Amendment to *any* governmental entity that does not have a "stupid staff." See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n. 12 (1992)

(deferential scrutiny "amounts to a test of whether the legislature has a stupid staff"); *Nollan*, 483 U.S. at 841 (compliance with the Fifth Amendment is "more than an exercise in cleverness and imagination").

III. THERE IS NO PROCEDURAL BARRIER TO THIS COURT'S CONSIDERATION OF THE ISSUES IN THIS CASE

The City attempts to avoid review of the important constitutional issues presented here by misstating the record. First, the City argues that a statute of limitations defense that was never addressed by the Ninth Circuit bars review. Second, the City argues that the California Supreme Court's statement of the facts is binding and prevents review. Neither argument is defensible.

A. The Statute of Limitations Is Not a Barrier To Review of the Issue Preclusion and Legislative Exaction Issues

The City claims that this Petition should be denied because the claims are barred by the statute of limitations. But, an issue that was not passed on by the court below is not grounds to deny a petition for certiorari. Cf. *Matsushita Electric Indus. Co. v. Epstein*, 516 U.S. 367, 379, n. 5 ("While it is true that a respondent may defend a judgment on alternative grounds, we generally do not address arguments that were not the basis for the decision below.") In this case, the Ninth Circuit chose not to decide that issue. In fact, when this case was first before the Ninth Circuit in 1998, it also chose not to decide the statute of limitations issue. *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1101, 1106 (9th Cir. 1998) ("*San Remo I*").

The City's suggestion that this Court can easily decide the merits of the limitations defense is also indefensible. Indeed,

that defense turns on significant factual and legal issues that were not even discussed in the Ninth Circuit's opinion.[4]

B. The Petition Properly Stated the Facts and, in Any Event, the Undisputed Facts Permit this Court to Completely Resolve the Legislative Exaction Issue

The City's claim that the Petition misstates the facts because it was based on the complaint and does not repeat all of the facts mentioned in the state supreme court opinion is legally baseless. The Petition properly relied on the facts alleged in the complaint because this case was decided on a motion to dismiss under Fed.R.Civ.P. 12(b)(6). Similarly, the facts in the Ninth Circuit's opinion do not track the state court opinion; indeed, the Ninth Circuit rejected the City's request to change its fact statement because of purported conflicts with the state court opinion. Order, filed May 7, 2004. The Ninth Circuit was right. Moreover, the City has not identified a single relevant factual discrepancy between the complaint in this case and the state court's statement of facts. Indeed, the facts required to reach the constitutional issues are starkly presented to this Court and the relevant facts are undisputed or are a matter of public record. On those facts,

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[4] Petitioners made four separate arguments: (1) Under this Court's decision in *Franconia Associates v. United States*, 536 U.S. 129 (2002), the Takings claims did not accrue until the City applied the Hotel Ordinance to the San Remo Hotel by requiring payment of the $567,000 fee; (2) The District Court improperly relied on a state court of appeal opinion that was later reversed by the state supreme court in *Travis v. County of Santa Cruz*, 33 Cal.4th 757, 94 P.2d 538 (2004); (3) State law rules of equitable tolling prevented the expiration of the statute of limitations; and (4) In the first Ninth Circuit appeal, the City prevailed on the argument that the as-applied Takings claims were unripe, *San Remo I*, 145 F.3d at 1102; thus, the City is estopped to argue that the claims were barred by the statute of limitations before they were ripe. Appellants' Opening Brief, filed November 8, 2003, at 30-39.

the City exacted $567,000 from petitioners to pay for housing problems that they did not cause and did not exacerbate.

When Petitioners purchased the San Remo Hotel, it was zoned for commercial use, with no restrictions at all on tourist use. Brief in Opposition at 6 n. 4 (before 1979, City did not limit tourist or residential use of the hotel). Many years later, the Hotel Ordinance designated rooms as residential units based on their use on September 23, 1979: if a room was occupied for the prior 32 days by the same person it was designated residential, even if the room had always been occupied by tourists before that. Hotel Ordinance § 41.4(n) and (q), App. F-202a, 203a. Then, in 1993, the City granted a permit allowing petitioners to avoid the City's regulations and continue their long-standing and fully-licensed hotel operations on condition that petitioners pay an exaction of $567,000. *San Remo III*, App. B-9a. Had Petitioners not complied, the City would have revoked their legal rights to operate as a tourist hotel -- rights that were unquestioned when they purchased the San Remo Hotel, invested in it, and obtained unrestricted City licenses and permits for its tourist use. Finally, the City conceded in the Hotel Ordinance itself that its purpose was to "benefit the general public" by shifting the costs of providing housing for the poor, the elderly, and the disabled to private landowners. Hotel Ordinance §§ 41.2 and 41.3(m)., App. F - 195a, 198a.

Needless to add, the City's procedural challenges are meritless. Indeed, the undisputed facts alone are dispositive on the constitutional issue. The City targeted petitioners and the owners of other small hotels to make them pay for housing shortages that "should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Dated: November 30, 2004.

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No. 04-340

In The

Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T&R INVESTMENT CORP.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

Page (s)

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. THE PROCEDURE MANDATED BY *WILLIAMSON COUNTY* DESPERATELY NEEDS FIXING.....3

II. PROPERTY CAN BE WRONGLY TAKEN THROUGH A LEGISLATIVELY IMPOSED EXACTION AS EASILY AS IT CAN THROUGH AN AD HOC ADMINISTRATIVE DECISION 5

A. This Court Has Recognized That A Legislative Act Can Result In A Taking.....5

B. *Dolan* Itself Involved A Legislatively Imposed Exaction.....6

III. THE CHARACTERIZATION OF GOVERNMENTAL ACTION AS LEGISLATIVE VS. ADMINISTRATIVE HAS PROVED TO BE UNWORKABLE 7

IV. LEGISLATIVELY IMPOSED EXACTIONS CAN BE EASILY IMPOSED ON "OTHERS" 9

V. THE PETITIONERS HAVE UNDERSTATED THE NUMBER OF DECISIONS WHICH HAVE WRESTLED WITH THE APPLICATION OF *DOLAN*.....10

VI. EXACTIONS HURT AFFORDABLE HOUSING....12

VII. CONCLUSION 16

TABLE OF AUTHORITIES

Cases **Page (s)**

Agencia la Esperanza Corp., Inc. v. Orange County Bd. of Supervisors, 2002 WL 681798 (Cal. App. 2002), *cert. denied*, 538 U.S. 916 (2003).....11

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California Bldg. Indus. Ass'n v. Governing Bd. of the Newhall School Dist., 253 Cal. Rptr. 497 (1988) 9

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Swift v. Tyson, 41 U.S. 1 (1842).....16

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Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).....16, 2, 3, 5

Wonders v. Pima County, 89 P.3d 810 (Ariz. Ct. App. 2004).....11

Constitutional and Statutory Provisions

Federal

2 U.S.C. § 9701.....5

25 U.S.C. § 2206.....5

California

Cal. Const. art. XIIIA, § 4.....9

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of the petitioners, and has filed letters of consent with the Clerk of the Court.[1]

THE NAHB'S INTEREST ARISES FROM ITS MEMBERS' CONCERNS AS TO THEIR ABILITY TO RECOVER FOR THE INJURY SUFFERED BY THEM WHEN THEY ARE FACED WITH WRONGFUL EXACTIONS

The NAHB represents over 215,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that allows essentially unreviewable exactions to be imposed on new development, and then effectively strips the federal courts of any role in the judicial review process.

The NAHB has appeared before the Court as an *amicus curiae* or as "of counsel" to the landowners in a number of cases involving the rights and remedies of landowners who have been adversely affected by governmental actions. These include: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473

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1 No counsel for any of the parties authored any part of this brief. No person or entity other than the NAHB has made any monetary contribution to the preparation or submission of this brief.

U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987)[2]; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'Ship v. United States Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); and *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004).

SUMMARY OF THE ARGUMENT

In *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), this Court held that a claim that governmental action had resulted in a regulatory taking, in violation of the Fifth and Fourteenth Amendments, was not ripe for review until the claimant had first sought just compensation using state provided procedures. The application of *Williamson County* by the lower federal courts has lead some courts – such as the Ninth Circuit in the case at bar – to effectively prohibit a regulatory taking claim from ever being heard by any federal court. Other Courts of Appeals, such as the Second Circuit in *Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir.), *cert. denied*, 125 S. Ct. 14 (2004), have taken a completely opposite position. The combination of the diametrically opposed positions of the

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2 The Court's opinion cited the NAHB's brief. (483 U.S. at 840.)

Second and Ninth Circuits, and the role that the federal courts should play in forming the law of regulatory takings, argues strongly that this Court should consider whether the policy set forth in *Williamson County* should be revisited.

Further, the reach of this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which held that a municipality must justify the imposition of an exaction as a condition of a land use approval by demonstrating a "rough proportionality" between the impact caused by the new development and the exactions imposed to mitigate it, has lead to substantial confusion among lower courts throughout the nation.

The reach of both *Williamson County* and *Dolan* have a substantial impact on the ability of American developers to deliver affordable housing. The grant of this Court's writ of *certiorari* to clarify the application of those cases is sorely needed.

ARGUMENT

I.

THE PROCEDURE MANDATED BY *WILLIAMSON COUNTY* DESPERATELY NEEDS FIXING

The petitioners have pointed out the problems which have arisen as a result of this Court's decision in *Williamson County*. (Petition at 6–10). The language used by the petitioners doesn't begin to match that used by the commentators who have derided the problems spawned by *Williamson County* as "worse than mere chaos,"[3] "absurd,"[4]

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3 Robert H. Freilich, *The Public Interest is Vindicated: City of Monterey v. Del Monte Dunes*, 31 Urb. Law. 371, 387 (1999).

4 Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 17, 27 (1997).

"nonsense,"[5] "riddled with obfuscation and inconsistency,"[6] a "Kafkaesque maze,"[7] and "a fraud or hoax on landowners,"[8] just to name a few.

As discussed by the petitioners, this Court is faced with a clear split amongst the Circuits on the question of whether claim preclusion (collateral estoppel) can be avoided by a landowner who makes a reservation in state court of the right to have a subsequent federal court decide federal takings claims, a procedure analogous to that authorized in the abstention context by *England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964); (Petition at 6-10).

Put another way, can a takings claim ever be decided by a federal court? The Sixth Circuit recently expressed its understanding that this Court had not intended to always preclude federal court review of Fifth Amendment takings claims:

> "In the takings realm, where *Williamson County* prong-two ripeness combined with res judicata law would otherwise bar all federal takings claimants from the door of the district court – a result clearly not contemplated by the Court in *Williamson County* – this sort of extension of *England* to unwilling state court litigants is necessary to avoid grave unfairness." *DLX, Inc. v. Kentucky*, 381 F.3d 511, 523 n. 9 (6th Cir. 2004).

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5 Peter A. Buchsbaum, *Should Land Use be Different? Reflections on Williamson County*, in *Taking Sides on Takings Issues: Public and Private Perspectives* 480 (Thomas E. Roberts, ed., A.B.A. 2002).

6 Testimony of Professor Daniel R. Mandelker before the Judiciary Committee, U.S. House of Representatives, *reprinted in* 31 Urb. Law. 195 at 234, 236 (1999).

7 Timothy J. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West. L. Rev. 1, 51 (1992).

8 Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 71 (1995).

At the very least, the ripeness elements of *Williamson County* have resulted in substantial delays before a federal court hears a takings case. If the Court of Appeals' decision in the case at bar is allowed to stand, then *Williamson County's* state procedure requirement will be transmitted into an outright denial and no federal court in the Ninth Circuit will ever hear a federal takings claim. If that is what this Court contemplated in *Williamson County*, then it should say so.

II.

PROPERTY CAN BE WRONGLY TAKEN THROUGH A LEGISLATIVELY IMPOSED EXACTION AS EASILY AS IT CAN THROUGH AN AD HOC ADMINISTRATIVE DECISION

A. This Court Has Recognized That A Legislative Act Can Result In A Taking

This Court has frequently – and recently – held that a legislative enactment can result in an unconstitutional taking. See, *e.g.*, *Babbitt v. Youpee*, 519 U.S. 234 (1997), which, for a second time, following *Hodel v. Irving*, 481 U.S. 704 (1987), held the escheat provision of the Indian Land Consolidation Act, 25 U.S.C. § 2206, unconstitutional. See also the plurality opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which held that the application of the Coal Industry Retiree Health Benefit Act of 1992, 2 U.S.C. §§ 9701-9722, was unconstitutional insofar as it made the plaintiff liable for millions of dollars in contributions to fund health care benefits based on its predecessor company's activities decades earlier.

B. *Dolan* Itself Involved A Legislatively Imposed Exaction

Dolan is the case which has given rise to the question now before this Court: whether a legislatively imposed exaction is entitled to more deference than one imposed through an ad hoc administrative proceeding. However, *Dolan* did not involve an ad hoc decision; it merely applied the required dedication standards set forth in Tigard's Community Development Code ("CDC"):

> "The CDC required property owners in the area zoned Central Business District to comply with a 15 per cent open space and landscaping requirement, ... The CDC requires that new development facilitate [a plan for a pedestrian/bicycle pathway] by dedicating land for pedestrian pathways where provided for in the pedestrian/bicycle pathway plan." 512 U.S. at 377-378.

Nevertheless, footnote 8, on page 391 states:

> "Here, by contrast, the City made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel."

Justice Souter, in his dissent, pointed out that footnote 8 misstated the genesis of the condition:

> "The majority characterizes this case as involving an 'adjudicative decision' to impose permit conditions, *ante*, at 391, n. 8, but the permit conditions were imposed pursuant to Tigard's Community Development Code." 512 U.S. at 413, n.*.

Thus, the predicate for the numerous decisions which turn on the manner in which an exaction has been imposed – legislative or administrative – is not justified by

the facts of the very case cited as the basis for the dichotomy.

III.

THE CHARACTERIZATION OF GOVERNMENTAL ACTION AS LEGISLATIVE VS. ADMINISTRATIVE HAS PROVED TO BE UNWORKABLE

As subsection II. B, *supra*, points out, it is difficult to determine just when a particular action should be characterized as legislative as opposed to administrative, particularly in the land use context. In *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620 (Tex. 2004), the Texas Supreme Court found that a requirement in the Town's municipal code, which required that a developer replace a perfectly good asphalt road with a more expensive concrete road (notwithstanding the fact that the development did not create the need for the replacement), constituted a compensable taking. In doing so, the Court replied to the Town's argument that *Dolan* applied only to adjudicative decisions. After rejecting the argument, the Court stated:

> "Nor are we convinced that a workable distinction can always be drawn between actions denominated adjudicative and legislative. ..." 135 S.W.3d at 641.

For example, state courts are split on whether a rezoning is always a legislative act. California holds that the rezoning of a single parcel of land, "whatever the size of the parcel affected," is a legislative act. *Arnel Development Co. v. City of Costa Mesa*, 620 P.2d 565, 567 (Cal. 1980). California is in the majority; however, there are a substantial number of states which hold that the rezoning of small parcels of property are to be reviewed as administrative acts. 3 Arden H. Rathkopf, *The Law of Zoning and Planning*, Ch. 40, *Rezonings: Substantive Validity and Standards for Judicial Review*, §§ 40: 18-25,

Rezonings as Quasi-Judicial Acts: Standards of Judicial Review (2004).

In *Harris v. County of Riverside*, 904 F.2d 497 (9th Cir. 1990), the Court of Appeals held that the rezoning of the plaintiff's .75 acre site by a California County was so individualized, and had such a specific impact on the plaintiff, that the failure to give the plaintiff notice and an opportunity to be heard before the rezoning – which came about, in part, because of the importunings of a local city council member – violated the plaintiff's right to substantive due process.

> "In determining when the dictates of due process apply, however, we find little guidance in formalistic distinctions between 'legislative' and 'adjudicatory' or 'adjudicative' government actions." 904 F.2d at 501.

Harris was followed in *Nasierowski Brothers Investment Co. v. City of Sterling Heights*, 949 F.2d 890, 895-897 (6th Cir. 1991), on very similar facts.

See also *Dudek v. Umatilla County*, 69 P.3d 751 (Or. Ct. App. 2003), where the County's Development Ordinance required a minimum 60 foot right of way in connection with a subdivision which would end up in a private road serving four or more parcels. 69 P.3d at 753, n. 4. The County, relying on *Dolan*'s requirement of rough proportionality, decided not to impose the requirement because the burden of doing so would be far out of proportion to the impact caused by the development approval sought by the landowner based. 69 P.3d at 754. The Oregon Court of Appeals recognized that the County's Development Ordinance applied broadly but found discretion – not contained in the Ordinance – which took the County's decision out of the legislative realm. Fairly read, *Dudek* is actually a legislatively imposed exaction which the court felt went too far.

These are but a few of the many cases which demonstrate the difficulty of determining whether, and in what situations, *Dolan* applies.

IV.

LEGISLATIVELY IMPOSED EXACTIONS CAN BE EASILY IMPOSED ON "OTHERS"

The petitioners have quoted Justice Thomas's dissent, joined by Justice O'Connor, to the denial of *certiorari* in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995), which pointed out that "[a] city council can take property just as well as a planning commission can." (Petition at 11.) Implicit in this argument is the understanding that it is both tempting – and easy – to impose a cost on a small number of individuals particularly if, as is so often the case in residential development, the payor is an out-of-town corporation which doesn't even have a vote. The courts of California have recognized the unfairness of this situation in an analogous context.

In *California Bldg. Indus. Ass'n v. Governing Bd. of the Newhall School Dist.*, 253 Cal. Rptr. 497 (1988), the Court of Appeal held that a voter approved "special tax," imposed only on new development, was actually a development fee which was invalid because it exceeded the state mandated limit.

> "Section 4 [of Art. XIIIA of the California Constitution] provides that the special taxes imposed by cities, counties and special districts must be imposed 'on such district.' For the reasons discussed below, we interpret this directive language to preclude taxes which the electorate impose on others and not directly on themselves ...." 253 Cal. Rptr. at 511.

The Court of Appeal was simply not going to allow the voters to approve a tax which could never be imposed on the voters themselves.[9]

> "To adopt the school districts' interpretation of the phrase 'on such district' would allow the absurd consequence affected by the voters in the instant case – overwhelming passage of a 'tax' which they themselves do not have to pay, either directly or indirectly." 253 Cal. Rptr. at 512 (footnote omitted).

Immunizing legislatively imposed exactions from the rough proportionality requirement imposed by *Dolan* allows the majority *carte blanche* to require a developer – not you, not me, but the man behind the tree[10] – to pay for problems which new development did not create.

V.

THE PETITIONERS HAVE UNDERSTATED THE NUMBER OF DECISIONS WHICH HAVE WRESTLED WITH THE APPLICATION OF *DOLAN*

The petitioners cite a number of cases which have held that *Dolan* either does, or does not, apply to

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9 The "special taxes" would be imposed "*only* upon *new* units of residential development. In fact, the voter pamphlet material, as well as the proponents' advertising soliciting a 'yes' vote, repeatedly emphasized that existing residents would not be assessed or required to pay the special taxes." 253 Cal. Rptr. at 500, n. 4 (italics in the original).

10 Russell Long, former chairman of the Senate Finance Committee explained the difficulty associated with tax reform because of the philosophy "Don't tax you, don't tax me, tax that fellow behind the tree." Fred R. Shapiro, *The Oxford Dictionary of American Legal Quotations* 401 (Oxford Univ. Press 1993) (quoting from *Forbes*, Dec. 15, 1976).

legislatively imposed exactions. (Petition at 10 - 12.) The petitioners have not, however, exhausted the field. This is particularly true in California where, on one day, one Court of Appeal decided three cases, all on the basis that rough proportionality did not apply to legislatively imposed exactions. *Agencia la Esperanza Corp., Inc. v. Orange County Bd. of Supervisors*, 2002 WL 681798 (Cal. App. 2002), *cert. denied*, 538 U.S. 916 (2003); *Extra Space of Laguna Hills v. City of San Clemente*, 2002 WL 700930 (Cal. App. 2002); and *Extra Space of Laguna Hills v. San Joaquin Hills Transp. Corridor Agency*, 2002 WL 683835 (Cal. App. 2002). The three cases together involved roughly $1,250,000.

Other cases holding that *Dolan* does not apply to legislatively imposed exactions include *Wonders v. Pima County*, 89 P.3d 810, 816 (Ariz. Ct. App. 2004); *Greater Atlanta Homebuilders Ass'n v. DeKalb County*, 588 S.E.2d 694, 697 (Ga. 2003); *Homebuilders Ass'n v. Tualatin Hills Park & Recreation Dist.*, 62 P.3d 404, 409 (Or. Ct. App. 2003); *Home Builders Ass'n v. City of Napa*, 108 Cal. Rptr. 2d 60, 65 (2001), *cert. denied*, 535 U.S. 954 (2002); and *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996).

On the other hand, the Court in *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 390 (Ill. Ct. App.), *appeal denied*, 667 N.E.2d 1055 (Ill.), *cert. denied*, 519 U.S. 976 (1996), held that there is no reason to differentiate between exactions imposed legislatively or adjudicatively.

See also, *Note, the Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. Rev. 242 (2000), which reviewed 29 cases involving *Dolan* and concluded:

> "The survey of the caselaw reveals that the lower courts' application of the legislative/ adjudicative distinction is inconsistent." 75 N.Y.U. L. Rev. at 256.

VI.

EXACTIONS HURT AFFORDABLE HOUSING

The question of just how much a developer is required to pay is more than academic; it directly affects the ability and willingness of developers to provide badly needed housing.

Economists may argue over just who bears the incidence of exactions – the homebuyer, the developer, or the landowner who sells to the developer – but there is no question that there is an impact. James C. Nicholas *et al.*, *A Practitioner's Guide to Development Impact Fees* 61-68 (1991). Moreover, there is a general consensus that it is the homebuyer who ends up paying for exactions in the long run. Alan A. Altshuler & José A. Gómez-Ibáñez, *Regulations for Revenue: The Political Economy of Land Use Exactions* 98 (1993); *Development Exactions* 55 (Frank & Rhodes, eds. 1987); and Snyder & Stegman, *Paying for Growth: Using Development Fees to Finance Infrastructure* 100 (1986).[11]

> "Through various fees and assessments, as well as requirements for offsite improvements, communities can force developers to pay for infrastructure and public services associated with new development. Using their power to regulate land use, localities have gradually shifted the burden of supplying such infrastructure and services from the community at large to developers. Developers pass the costs along to new

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11 Research by the NAHB shows that the average building company makes a net profit of only 5.4% before taxes. NAHB, *Cost of Doing Business: The Business of Building – Measuring Your Success* 7 (2004). Given the narrow profit margin, builders pass on as much of the cost of exactions to house buyers as possible.

> homebuyers, in some cases adding substantially to the total cost of new housing.
>
> "Impact fees are regressive because they are assessed on a per-unit basis, rather than as a percent of the value of the home. Those who depend on affordable housing are forced to absorb fees that are a substantial percentage of the sales price of any home they purchase. For example, exactions, dedications, and fees account for as much as 30 percent of the cost of housing in New Jersey.
>
> "One consequence of high fee schedules is that developers opt to build housing only for the higher end of the single-family market where fees can be absorbed more easily as a proportion of sales price. Another consequence may be that developers prefer to construct single-family as opposed to multi-family projects. According to a recent Urban Land Institute study, it is easier for developers to pass the fees along to homebuyers than to renters. This preference can have a particularly dampening effect on the development of multifamily housing and may be partially responsible for the fact that the multifamily share of all housing starts declined by 10 percentage points between 1985 and 1989. Those who depend on more affordable housing are clearly disadvantaged when new development shifts to the upper income single-family end of the market." "*Not In My Back Yard*", *Removing Barriers to Affordable Housing*, Report to President Bush and Secretary Kemp by the Advisory Commission on Regulatory Barriers to Affordable Housing, 2-10-11 (1991) (footnotes omitted).

The statements contained in "*Not In My Back Yard*" are as true today as they were in 1991.

"• California development fees are extremely high. Single-family homebuilders in California in 1999 paid an average of $24,325 per unit in residential development fees, based on the results of a sample of 89 cities and counties. Owners of new infill homes paid an average of $20,327 per unit. Apartment developers paid an average of $15,531 per new apartment unit.

* * *

"• Fee-setting is not routinely linked with capital improvements planning. Local capital facilities fees are usually determined using an average cost methodology, *e.g.*, historical or projected capital costs are divided by the current or projected future population to yield a per capita or per household cost. As a result, the link between fees and longterm capital improvements programming (assuming such activities take place) is typically a weak one.

"A second issue of concern regarding local development fees concerns their contribution to the high cost of housing. Theory suggests, and some empirical studies demonstrate, that fees contribute directly to the higher housing prices, especially during periods of high housing demand. Among the key findings of the research in this area:

"• California's high residential development fees significantly contribute to its high housing costs and prices. Among the sample of California jurisdictions, fees account for an average of ten percent of the median price of new single-family homes.

"• The contribution of fees to home prices is greatest in affordable markets. Among individual communities in the sample, development fees accounted for less than five percent of new home prices in expensive communities. At the opposite end of the price spectrum, fees accounted for more than 15 percent of new home prices in many jurisdictions that provide a significant share of their respective region's affordable housing – making the fee issue all the more significant." Landis, Larice, Dawson & Deng, *Pay to Play: Residential Development Fees in California Cities and Counties, 1999*, 2-3 (2001), prepared for the Division of Housing Policy Development of the California Department of Housing and Community Development.[12]

The bottom line is that California alone is going to have to produce an average of 220,000 housing units every year until 2020 just to keep up with the expected growth in population. Landis, *Raising the Roof: California Housing Development Projections and Constraints, 1997–2020*, 7–1 (2000), prepared for the California Department of Housing and Community Development.[13]

The results found in *Pay to Play* are not unique to California. A study of housing prices in King County, Washington, came to exactly the same conclusion. Mathur, Waddell & Blanco, *The Effect of Impact Fees on the Price of New Single-Family Housing*, 41 Urb. Studies 1303 (2004).

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12 A copy of *Pay to Play* may be found on the internet at http://www.hcd.ca.gov/hpd/pay2play/fee_rpt.pdf.

13 A copy of *Raising the Roof* may be found on the internet at http://www.hcd.ca.gov/hpd/hrc/rtr/int1r.htm.

Based on recent census data and typical lending practices, each $1,000 increase in the price of a $100,000 house drives 420,000 households out of the home buying market. NAHB, *Determining the Numbers of Households Priced Out of a Market* (2004). Unwarranted exactions on development, which, sooner or later, translate into higher home prices, thus has a direct adverse effect on the nation's supply of affordable housing.

There is no practical way in which badly needed affordable housing can be provided unless the exactions imposed on new development are limited to those roughly proportional to the impacts created by that new development.

VII.

CONCLUSION

If, as Justice Holmes stated, "The life of the law has not been logic: it has been experience,"[14] then 20 years of experience with the application of *Williamson County*, culminating in the case at bar, should call for a searching reexamination of its continued viability. What apparently was intended to be a hurdle to be overcome has, at least in the Ninth Circuit, become a plaintiff's dead end. This Court has not been afraid to reverse itself when it has realized that its original decision was wrong. Compare *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), with *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

Developers in general, and the NAHB in particular, do not contend that new development should not be required to mitigate impacts created by that development. All that they ask is that they not be required to pay more than an amount roughly proportional to the impacts created – to not be required to do more than mitigate those impacts

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14 Oliver Wendell Holmes, *The Common Law* 5 (Mark DeWolfe Howe ed., Belknap Press of Harvard University Press 1963) (1881).

– which is what *Dolan* stands for. If all that is required to avoid the test of rough proportionality is to embody the exactions in a rate sheet which is ministerially applied, then *Dolan*'s promise is gutted.

> "[T]he Supreme Court has left unsettled the question whether *Dolan*'s rough proportionality test applies to legislative, as opposed to administrative exactions." *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998).

It is time that this Court answer that question.

Accordingly, the NAHB respectfully requests that the Court grant the petition for a writ of *certiorari* sought by the petitioners.

Dated: November 12, 2004 Respectfully submitted,

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No. 04-340

In the

Supreme Court of the United States

SAN REMO HOTEL, L.P., THOMAS FIELD, ROBERT FIELD, and T&R INVESTMENT CORP.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF REALTORS IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Is a Fifth Amendment Takings claim brought in federal court barred by issue preclusion based on a state court judgment denying compensation under state takings law?

2. May a local government avoid the "rough proportionality" test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by imposing development exactions by legislative enactment?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. *WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION*, AS APPLIED BY LOWER COURTS, GIVES TO STATE COURTS THE TASK OF DEVELOPING FEDERAL TAKINGS LAW 6

A. The *Williamson County* Ripeness Requirements Must Not Preclude Litigation of Federal Takings Claims from the Federal Trial and Appellate Courts ... 7

B. Federal Courts Must Define the Contours of Federal Takings Law; That Responsibility Cannot Be Left to the State Courts 9

II. APPLICATION OF *DOLAN*'S STANDARD OF "ROUGH PROPORTIONALITY" CANNOT DEPEND ON THE METHOD BY WHICH EXACTIONS ARE IMPOSED 12

A. The Risk of Government Extortion Does Not Disappear When Exactions Are Imposed Legislatively 13

B. The Political Process Provides Inadequate Protection from Extortionate Exactions 14

TABLE OF CONTINUED

Page

C. The Legislative-Adjudicative Distinction Creates Great Uncertainty 15

D. The Bright-Line Test Adopted by the California Supreme Court, and Followed by a Number of Other State Courts, Does Not Further the Purpose of the Takings Clause 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Armstrong v. United States, 364 U.S. 40 (1960) 16

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TABLE OF AUTHORITIES—Continued

Page

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Page

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Constitution

U.S. Const. amend. V 16

Rules

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

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Page

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Page

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INTEREST OF AMICI CURIAE[1]

For more than 30 years, Pacific Legal Foundation (PLF) has litigated in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). And PLF has participated as amicus curiae in nearly every other major real property takings case heard by this Court in the past three decades.

PLF previously participated as amicus curiae in this case and the related state court case. PLF filed amicus briefs in support of San Remo Hotel, L.P., Thomas Field, Robert Field, and T&R Investment Corp. (Petitioners herein) before the Ninth Circuit Court of Appeals, the United States District Court for the Northern District of California, the California Supreme Court, and the California Court of Appeal.

Amicus National Association of Realtors (NAR) is a nonprofit association representing over one million members engaged nationwide in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. Its members contribute to such

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. A letter evidencing such consent has been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

activities as promotion of equal opportunity in housing, real estate licensing, neighborhood revitalization, safeguarding real property rights, public service, and cultural diversity. The National Association of Realtors has participated as amicus curiae in numerous property rights cases before this Court, including *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

This case raises important issues of constitutional law. Amici file this brief to assist the Court in considering the conditions under which property owners may present their claims for recovery of compensation for harm to private property under the Fifth and Fourteenth Amendments to the United States Constitution in a federal forum.

Specifically, PLF and NAR argue that *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), must not be interpreted to deny federal takings claims in federal courts. Amici also argue that the manner by which an exaction is imposed cannot determine the applicable constitutional test. PLF and NAR believe that their public policy perspective and litigation experience provides an additional viewpoint on the issues presented in this case.

STATEMENT OF THE CASE

The San Remo Hotel is a family owned and operated hotel located in the North Beach section of San Francisco (City). Since at least 1971, the San Remo has been operated as a tourist hotel. In 1979, the City imposed a moratorium on the demolition or conversion of hotel rooms classified by the City as "residential." This moratorium became a permanent prohibition in 1981, when the City adopted the initial version of

its Residential Hotel Unit Conversion and Demolition Ordinance (HCO). *See San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 91-92 (Cal. 2002), Appendix (App.) at 108a-109a. The current version of the HCO was enacted in 1990. The HCO seeks to alleviate the "adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition." *Id.*

Prior to the HCO, the City did not make distinctions between residential hotels which house long-term tenants, and commercial hotels that provide overnight accommodations for tourists. The City now applies the HCO to make such distinctions on a room-by-room basis within individual structures. The 1981 ordinance required hotel operators to submit a report documenting the number of tourist and residential units in their hotels as of September 23, 1979. Since then, the HCO has kept this distribution frozen.

Under the HCO, any "conversion" of rooms from residential to any other use is forbidden without a permit from the City. As a prerequisite to obtaining a conversion permit, the hotel owner must either dedicate an equivalent amount of housing to the City or pay an "in lieu" fee equal to the cost of site acquisition plus 40% (since 1990, 80%) of the cost of constructing an equivalent number of affordable housing units.

Shortly before the effective date of the 1990 HCO, the owners of the San Remo applied for a permit to "convert" their hotel to full tourist use. To this end, the City Planning Commission granted a conditional use permit for the San Remo, subject to a requirement that the owners make a cash payment of $567,000 to the City pursuant to the HCO. This fee was paid under protest, and the San Remo challenged the City's exaction in federal court, arguing that the exaction is a

regulatory taking in violation of the Fifth Amendment to the United States Constitution.

San Remo's petition includes a detailed summary of the procedural history of its takings claims. Petition at 4-6. Briefly, the federal court sent San Remo to the California state courts to ripen its takings claims pursuant to *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172. The California Supreme Court denied San Remo's state takings claims. *San Remo Hotel, L.P. v. San Francisco City and County*, 364 F.3d 1088, 1093 (9th Cir. 2004), App. at 9a-11a. Then, San Remo returned to the federal courts to litigate its federal takings claims. San Remo lost again. The Ninth Circuit affirmed the district court's ruling that San Remo was barred from litigating its federal takings claims in federal court, because "the California Supreme Court's adjudication of the state takings claims was an 'equivalent determination' of the federal takings claims." *Id.* at 1090, App. at 4a. The Ninth Circuit concluded that neither federal takings law, nor California takings law, applies a "rough proportionality" standard to legislatively imposed exactions. *Id.* at 1097-99, App. at 17a-21a.

SUMMARY OF ARGUMENT

Petitioners in this case are not the first to be caught in the *Williamson County* "trap."[2] The ripeness requirements of *Williamson County* regularly are applied to preclude property owners from bringing federal takings claims in federal courts. That cannot be what this Court intended; *Williamson County* itself holds out the promise of federal adjudication of federal takings claims. And in *England v. Louisiana State Board of*

[2] *See* Michael M. Berger, *Ripeness: Historical Derivation and Lingering Dysfunction*, SE45 ALI-ABA 461, 467 (2000) (The interplay between *Williamson County* and the rules of res judicata and collateral estoppel "can be worse than chaos; in many cases, it's a trap.").

Medical Examiners, 375 U.S. 411 (1964), this Court emphasized the importance of allowing litigants to have their federal claims decided in the federal courts. It is just as important to the development of the law. The federal courts are precluded from defining the contours of federal takings law when federal takings claims are relegated to the state courts.

The California Supreme Court is one of the state courts that uses two separate standards of review to takings challenges involving development exactions. The "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), is applied when an exaction is imposed adjudicatively, and a rational basis standard is applied to legislatively imposed exactions. The California Supreme Court, and other state courts that follow its example, are wrong to rely on a legislative-adjudicative distinction to determine the appropriate standard of review. The government is just as likely—perhaps more likely—to impose extortionate exactions through legislation of general applicability. The difficulty of distinguishing which local government actions are legislative and which are adjudicative only adds to the confusion and inconsistency exhibited by the lower courts on this issue. The "rough proportionality standard" must be applied to all development exactions, regardless of how they are imposed; it is the only way to assure that property owners receive the protections guaranteed by the Takings Clause.

ARGUMENT

I

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, AS APPLIED BY LOWER COURTS, GIVES TO STATE COURTS THE TASK OF DEVELOPING FEDERAL TAKINGS LAW

The property owners in this case find themselves in a perplexing situation. San Remo was forced to ripen its Fifth Amendment federal regulatory takings claims by seeking compensation in state court. Then San Remo's federal takings claims were dismissed because the district court found that the process of ripening the federal claims extinguished them. Federal takings claims are routinely dismissed as unripe when first litigated in federal court.[3] *See* John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195, 234-36 (1999), which includes testimony of Daniel R. Mandelker[4] before the House Judiciary Committee Subcommittee on Courts and Intellectual Property. Professor Mandelker expressed his opinion that "federal judges have distorted the Supreme Court's ripeness precedents to achieve an undeserved and unwarranted result: they avoid the vast majority of takings cases on their merits." *Id.* at 236.

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[3] *See, e.g., Daniel v. County of Santa Barbara*, 288 F.3d 375, 381 (9th Cir.), *cert. denied*, 537 U.S. 973 (2002); *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1126 (9th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000); *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1101-02 (9th Cir. 1998).

[4] Professor of law at the University of Washington in St. Louis, Missouri, and a prolific author on the law of zoning and land use planning.

The importance of this problem cannot be overstated. Professor Steven J. Eagle described the "notion of 'ripeness' " as "the greatest barrier to the protection of property rights." *State Approaches to Protecting Private Property Rights: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1997) [Available on Westlaw, 1997 WL 626959 (F.D.C.H.)] (Statement of Steven J. Eagle, Professor of Law, George Mason University School of Law). [5]

A. The *Williamson County* Ripeness Requirements Must Not Preclude Litigation of Federal Takings Claims from the Federal Trial and Appellate Courts

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. at 195, this Court established a test for determining if a takings case is ready to be heard in federal court. First, administrative action must be final,[6] and second, a plaintiff must have sought "compensation through the procedures provided by the State." *Id.* Only the second requirement is relevant to the instant case. And as to that requirement, this Court explained as follows:

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[5] Professor Eagle emphasized that he was not referring to the

> normal requirements that a matter involves a case or controversy over which the court has jurisdiction or the normal prudential requirements. Rather, the Supreme Court has developed "a special ripeness doctrine applicable only to constitutional property rights claims." Timothy V. Kassouni, "The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights," 29 Cal. W. Rev. 1, 2 (1992).

Id.

[6] "[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury . . . ." *Id.* at 193.

> [B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation *before* bringing a § 1983 action.

Id. at 195 n.13.

Two years later, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315-16 (1987), this Court said that the state courts must provide adequate procedures for recovery of just compensation when government takes private property. *Williamson County* and *First English*, read together, require that property owners seek and be denied compensation in state court before bringing a federal takings claim in federal court. That said, this Court has not explained how the lower federal courts should resolve the issue preclusion and claim preclusion questions that can arise when property owners seek to ripen their federal takings claims in state court as required by *Williamson County*.

What should be clear is that the very steps necessary to ripen a federal takings claim should not serve to bar that claim. This Court's language holds out the promise of federal adjudication of a federal takings claim. In *Williamson County*, this Court explained that the takings claim was *premature* (*see, e.g.*, *Williamson County*, 473 U.S. at 185, 187, 194, 196) and not ripe (*see, e.g.*, *id.* at 186, 194).

> Throughout the opinion, the Court returns to these twin concepts, emphasizing and reemphasizing the temporal nature of its holding, repeatedly saying that land use cases *can* be ripened and *then* litigated in federal court.

Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J.L. & Pol'y 99, 104 (2000) (emphasis added).

In another context, habeas corpus review, this Court explained that construing a law as ceding authority to interpret federal law to the states would be an important change in the Court's jurisdiction, requiring a clear intent on the part of Congress to do so. *Williams v. Taylor*, 529 U.S. 362, 379 (2000). Amici urge this Court to review this case and open the doors of the federal courthouse to those with federal takings claims.[7]

B. Federal Courts Must Define the Contours of Federal Takings Law; That Responsibility Cannot Be Left to the State Courts

When takings claims ripened through state procedures are precluded from resolution in the federal courts by claim or issue preclusion, the federal courts do not contribute to the development of the law pertaining to Fifth Amendment takings. State courts will decide when compensation is appropriate and how it should be measured (*see* George A. Yuhas, *The Ever-Shrinking Scope of Federal Court Takings Litigation*, 32 Urb. Law. 465, 475 (2000)), and the only remaining federal court review is direct review by this Court (*see id.* at 466). Some commentators suggest that is acceptable,[8] but this Court

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[7] *See* Berger, *Supreme Bait & Switch*, *supra*, at 122 ("Once property owners submit their claims to state courts, their risk of never seeing the inside of a federal courthouse is high.").

[8] *E.g.*, Thomas E. Roberts, *Procedural Implications of* Williamson County/First English *in Regulatory Takings Litigation: Reservations, Removal, Diversity, Supplemental Jurisdiction,* Rooker-Feldman*, and Res Judicata*, 31 Envtl. L. Rev. 10353, 10354 (2001); Kathryn E. Kovacs, *Accepting the Relegation of Takings*

(continued...)

disagreed in *England v. Louisiana State Board of Medical Examiners*. In *England*, this Court said that appellate review by the High Court does not provide adequate recourse to those who want to litigate federal claims in federal court.

> It is true that, after a postabstention determination and rejection of his federal claims by the state courts, a litigant could seek direct review in this Court. But such review . . . is an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. There is always in litigation a margin of error, representing error in factfinding . . . . Thus in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination. The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts.

375 U.S. at 416-17 (internal quotations, citations, and footnote omitted).

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[8] (...continued)
Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under Williamson County, 26 Ecology L.Q. 1, 34-47 (1999).

England is an abstention case, not a takings case, but this Court's words are equally relevant to Fifth Amendment takings cases.

> [A]s the Court acknowledged in abstention cases, it now seems necessary, as the lowest level of protection affordable to Fifth Amendment property rights, for the Court to acknowledge that in the unique class of land use ripeness cases a trial in state court may be a precondition designed to weed out the cases where relief is granted by state law. Obtaining state court relief may moot the federal issue, but unsuccessful state court litigation "may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in federal courts."

Berger, *Supreme Bait & Switch*, *supra*, at 129-30 (quoting *England v. Louisiana State Board of Medical Examiners*, 375 U.S. at 417). *See* Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 Colum. L. Rev. 1211, 1270 (2004) (Preclusion law should provide no more of an obstacle when litigating a takings claim than it did in *England* itself.).

Far more is involved than a plaintiff's desire to litigate his or her case in federal court: an interpretation of *Williamson County* that cuts lower federal courts out of federal takings cases ignores the distinct roles of the Federal Constitution and state constitutions. The United States Constitution "prescribes a floor below which protections may not fall, rather than a ceiling beyond which they may not rise." *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990). State constitutions can provide protections for civil liberties that are more expansive than those provided by the United States Constitution. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). Amici PLF and National Association of Realtors urge this Court to act now so that the

lower federal courts can set the floor for and define the contours of federal takings law.

II

APPLICATION OF *DOLAN*'S STANDARD OF "ROUGH PROPORTIONALITY" CANNOT DEPEND ON THE METHOD BY WHICH EXACTIONS ARE IMPOSED

As Petitioner and Amicus National Association of Home Builders (NAHB) ably describe, there is a nationwide split of authority on the question of whether the heightened standard of judicial scrutiny articulated in *Dolan v. City of Tigard*, 512 U.S. 374, applies to legislatively adopted exactions. *See* petition at 11-12; and amicus curiae brief of NAHB. In California, the "rough proportionality" standard of scrutiny described in *Dolan* does not apply to legislatively imposed exactions. The California Supreme Court adopted a bright-line test: the *Dolan* standard of scrutiny applies to exactions imposed on an individual and discretionary basis, and a rational basis standard applies to generally applicable, legislatively formulated exactions. *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal.), *cert. denied*, 519 U.S. 929 (1996).[9]

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[9] *See San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d at 104-05, App. at 139a ("[A] housing fee . . . assessed under the [San Francisco ordinance] stands in sharp contrast to the recreational facilities replacement fee we found subject to heightened scrutiny in *Ehrlich*."); *Santa Monica Beach, Ltd. v. Superior Court of Los Angeles County*, 968 P.2d 993, 1002 (Cal. 1999) (The standard of scrutiny in *Nollan* and *Dolan* do not apply. "[A] different standard of scrutiny would apply to development fees that are generally applicable through legislative action."); *Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188, 1198-99 (Cal.), *cert. denied*, 525 U.S. 876 (1998) (A more deferential standard of judicial review is appropriate in this case where neither conveyances (continued...)

A. The Risk of Government Extortion Does Not Disappear When Exactions Are Imposed Legislatively

In *Ehrlich*, the California Supreme Court opined that heightened scrutiny is not required when analyzing the constitutionality of legislatively formulated exactions, because "the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present." *Ehrlich*, 911 P.2d at 444. Other state courts followed suit. *See, e.g., Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966, 982 (Or. Ct. App. 2002), *cert. denied*, 538 U.S. 906 (2003) (*Dolan* only applies "with the sort of governmental leveraging that can arise in case-by-case adjudicatory imposition of development conditions."); *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, 696 (Colo. 2001) ("One critical difference between a legislatively based fee and a specific, discretionary adjudicative determination is that the risk of leveraging or extortion on the part of the government is virtually nonexistent in a fee system."); and *Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997) ("The California court suggested that the *Dolan* analysis applied to cases of regulatory leveraging that occur when the landowner must bargain for approval of a particular use of its land.").

The fact is that the risk of government extortion does not disappear when exactions are imposed by legislation of general applicability. *See* Inna Reznik, *The Distinction Between*

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[9] (...continued)
nor individualized development fees are at issue.); and *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851, 867 (Cal. 1997), *cert. denied*, 522 U.S. 1077 (1998) (*Nollan* and *Dolan* do not apply because "rent control neither requires a physical dedication nor amounts to an individual and discretionary development fee.") *Id.* at 868 n.1 (Mosk, J., concurring).

Legislative and Adjudicative Decisions in Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 251 (2000) ("The extortion and inequitable economic burdens that local governments potentially impose on landowners through administrative processes can occur just as easily in the legislative context.") *Id.* at 267. Indeed, it is highly probable that grossly disproportionate exactions will result from broadly applicable, generalized exaction programs. Local legislative bodies acting in their legislative capacity may be more likely to use the police power to exact unconstitutional conditions than in the adjudicative setting. *See* Reznik, *supra*, at 270-72. Those types of programs do not allow government to consider widely varying individual circumstances, and do not provide a means to accommodate those who do not fit within a program's general categories.

B. The Political Process Provides Inadequate Protection from Extortionate Exactions

Parties to adjudicative proceedings have significant procedural rights that may enhance equal treatment for competing interests. Reznik, *supra*, at 273. But the only safeguard against legislatively imposed extortionate exactions is found in the political process. The California Supreme Court said that

> [w]hile legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election.

San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d at 105, App. at 141a. *See Rogers Machinery, Inc. v.*

Washington County, 45 P.3d at 982, wherein the Oregon Court of Appeals cited the quoted language.

While the democratic political process may, as the California Supreme Court suggested, protect against "extortionate fees for all property development," it is doubtful that the political process would work as efficiently to remove government officials who impose extortionate fees on only some forms of property development. The cost of development exactions is invisible to the majority of voters, and developers are subject to the kind of majoritarian oppression that affects seriously outnumbered groups. *See* Reznik, *supra*, at 271-72; and William A. Fischel, *Utilitarian Balancing and Formalism in Takings*, 88 Colum. L. Rev. 1581, 1582 (1988).

C. The Legislative-Adjudicative Distinction Creates Great Uncertainty

The legislative-adjudicative distinction is not a viable means for determining whether or not to apply *Dolan*'s "rough proportionality" standard because it is difficult to pigeonhole local government action as legislative, administrative, or judicial. Local governments are not structured under strict separation of powers principles, and commonly combine these functions in land use decisionmaking. *See* Reznik, *supra*, at 257-61. *See also* Steven J. Eagle, *Symposium: When Does Retroactivity Cross the Line?:* Winstar, Eastern Enterprises *and Beyond: Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 Ala. L. Rev. 977, 1042 (2000) ("The problem of discerning which statutes are legislative and which are adjudicative for purposes of a *Dolan* analysis is apt to be open-ended and chronic.").

Inna Reznik authored the most comprehensive article on the problems encountered when differentiating between legislative and adjudicative decisions in land use cases. *See* Reznik, *supra*. In the article, Ms. Reznik describes the results of a survey of 29 cases. She put each case into one of three

categories: (1) scheduled exactions (where an amount of money or land was specified in advance by a legislative body); (2) negotiated (authorized by a legislative body but individually determined in response to a specific development proposal); or (3) not clear. *Id.* at 252. The results show a great deal of confusion among the courts, and an inconsistent application of the legislative-adjudicative distinction.

Of the cases involving exactions that were scheduled by the legislative body (those closest to legislative decisions), just as many courts applied *Dolan*'s "rough proportionality" test as refused to apply it because of the belief that *Dolan* applies only to adjudicative decisions. Reznik, *supra*, at 254. In challenges to negotiated exactions (those closest to adjudicative decisions), five out of nine applied *Dolan*'s "rough proportionality" standard. *Id.* at 255. And finally, in nine cases where the court did not clarify the nature of the exaction, eight out of nine applied the "rough proportionality" standard. *Id.* at 256.

The artificial distinction between fees imposed by legislative acts and those imposed by quasi-adjudicative acts creates uncertainty among the courts, property owners, and local governments. All would benefit from a manageable and predictable test.

D. The Bright-Line Test Adopted by the California Supreme Court, and Followed by a Number of Other State Courts, Does Not Further the Purpose of the Takings Clause

The Takings Clause of the Fifth Amendment to the United States Constitution guarantees that private property shall not "be taken for public use without just compensation." U.S. Const. amend. V. In *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court explained that "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." The

nexus and rough proportionality requirements ensure that the purpose of the Fifth Amendment is fulfilled by protecting property owners from government actions that impact arbitrarily and unevenly on isolated individuals. *See* James L. Huffman, *Colloquium on* Dolan: *The Takings Clause Doctrine of the Supreme Court and the Federal Circuit:* Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 Envtl. L. 143, 152 (1995) ("The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure.").

The nexus and rough proportionality tests of *Nollan v. California Coastal Commission*, 483 U.S. 825, and *Dolan* were adopted for the express purpose of preventing government from taking advantage of property owners seeking permits to develop or otherwise use private property. In *Nollan*, this Court used the now-famous phrase "'an out-and-out plan of extortion'" to describe the California Coastal Commission's attempt to take private property without paying just compensation. *Id.* at 837 (quoting *J.E.D. Associates, Inc. v. Town of Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)). *See Lambert v. City and County of San Francisco*, 529 U.S. 1045 (2000) (Scalia, Kennedy, & Thomas, JJ., dissenting to denial of certiorari) ("The object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the permit process '"an out-and-out plan of extortion."' "). (Citations omitted.)

Legal scholars argue that neither the Fifth Amendment nor the takings precedents support a legislative-adjudicative distinction between exactions, and those scholars urge an integrated doctrine that recognizes the constitutional equivalency of all exactions. *See* Huffman, *supra*, at 150 (Dean Huffman acknowledges the important procedural implications of a legislative-adjudicative distinction, but goes on to say that "it is not at all clear that the distinction should have any relevance with respect to the substantive protection of property

rights. From the point of view of the property owner, the consequence of a taking is the same whether done by the legislative, executive, or judicial branches of government. The Fifth Amendment draws no such distinction."). *See also* David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts are Doing About It*, 28 Stetson L. Rev. 523, 575 (1999) (Land development conditions require a legitimate state interest, nexus, and proportionality. "These rules extend to exactions beyond physical dedications even though *Nollan* and *Dolan* were land dedication cases. . . . Why should a common legislative scheme of conditions escape scrutiny if it lacks either nexus or proportionality? An unconnected or disproportionate condition is extortionate, regardless.").

Legislatively imposed exactions have become an increasingly popular method of funding local projects, and the distinction between exactions imposed by legislative acts and those imposed by quasi-adjudicative acts does not further the Takings Clause's substantive protection of private property.

CONCLUSION

This Court phrased the *Williamson County* prerequisites to federal takings litigation in terms of ripeness. The ripeness inquiry in a takings claim involves a determination that a property owner has exhausted all avenues for obtaining compensation.[10] The ripeness requirements cannot and should not extinguish the opportunity to litigate in federal court. As the Second Circuit Court of Appeals recently noted, such a result "would be both ironic and unfair." *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 130 (2d

[10] Laurence H. Tribe, *American Constitutional Law* 337 (3d ed. 2000).

Cir. 2003), *cert. denied*, No. 04-142, 2004 WL 2071528 (Oct. 4, 2004).

Equally unfair are the grossly excessive development exactions that result when courts refuse to apply the "rough proportionality" standard required by this Court in *Dolan v. City of Tigard*. The standard of review in a constitutional takings claim must not depend on arbitrary and ill-defined distinctions like the manner by which an exaction is imposed.

Amici Pacific Legal Foundation and National Association of Realtors respectfully request that this Court grant certiorari to resolve the important issues raised by the Ninth Circuit Court's decision in this case.

DATED: November, 2004.

Respectfully submitted,

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IN THE

Supreme Court of the United States

SAN REMO HOTEL L.P., *et al.*,
Petitioners,
v.
CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, CHAMBER OF COMMERCE OF THE UNITED STATES, ALLIED EDUCATIONAL FOUNDATION, AMERICAN ASSOCIATION OF SMALL PROPERTY OWNERS, NATIONAL TAXPAYERS UNION, ANTHONY PALAZZOLO, PROPERTY RIGHTS FOUNDATION OF AMERICA, SOUTH CAROLINA LANDOWNERS ASSOCIATION, SMALL PROPERTY OWNERS ASSOCIATION, SMALL PROPERTY OWNERS OF SAN FRANCISCO INST., AND UNITED LOT OWNERS OF CAMBRIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici curiae address only the first question presented by the Petition:

Did the U.S. Court of Appeals for the Ninth Circuit err in holding, contrary to a holding of the U.S. Court of Appeals for the Second Circuit, that issue preclusion bars consideration of a claim under the Fifth Amendment's Takings Clause where: (1) a state court has rejected the plaintiffs' analogous state-law cause of action; and (2) the plaintiffs filed their state court action for the sole purpose of ripening their Takings Clause claim, as required by this Court's decision in *Williamson County Planning Comm'n v. Hamilton Bank of Johnson City*?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 7

I. Review Is Warranted Because the Ninth Circuit's Decision Conflicts with Other Appeals Court Decisions and Threatens to Prevent Takings Clause Claimants from Ever Having Their Day in Court .. 10

II. Review Is Warranted on the Ninth Circuit's Application of Issue Preclusion, Regardless Whether the Court Is Inclined to Review the Second Issue 16

III. Review Is Warranted Because the Ninth Circuit's Decision Is So at Odds With This Court's Issue Preclusion Precedents 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases:

Allen v. McCurry,
449 U.S. 90 (1980) 13, 14, 19
Breneric Associates v. City of Del Mar,
69 Cal. App. 4th 166 (1998) 15
DLX, Inc. v. Kentucky,
381 F.3d 511 (6th Cir. 2004) 12, 15
Dodd v. Hood River County ("*Dodd I*"),
59 F.3d 852 (1995) 19
Dodd v. Hood River County ("*Dodd II*"),
136 F.3d 1219 (9th Cir.),
cert. denied, 525 U.S. 923 (1998) 14
Dolan v. City of Tigard,
512 U.S. 374 (1994) 4, 7, 16, 17
Ehrlich v. City of Culver City,
12 Cal.4th 854 (1996) 3, 4
England v. Louisiana State Bd. of Medical Advisors,
375 U.S. 411 (1964) ..... *passim*
Fields v. Sarasota Manatee Airport Authority,
953 F.2d 1299 (11th Cir. 1992) 11, 12
Haring v. Prosise,
462 U.S. 306 (1983) 18
Melillo v. City of New Haven,
249 Conn. 138 (1999) 16
Mitchum v. Foster,
407 U.S. 225 (1972) 15
Montana v. United States,
440 U.S. 147 (1979) 18
Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987) 4, 7, 16, 17

Page

Railroad Comm'n v. Pullman Co.,
312 U.S. 496 (1941) 2, 11, 14
San Remo Hotel v. City and County of San Francisco, 143 F.3d 1095 (9th Cir. 1998) .. 2, 11, 14
Santini v. Connecticut Hazardous Waste Mgmt. Serv.,
342 F.3d 118 (2d Cir. 2003) 6, 10, 11, 16
Stolz v. Bank of America,
15 Cal. App. 4th 217 (1993) 19
United States v. Moser,
266 U.S. 236 (1924) 19
Wilkinson v. Pitkin County Bd. of County Comm'rs,
142 F.3d 1319 (10th Cir. 1998) 12
Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,
473 U.S. 172 (1985) 2, 7, 10, 11, 15

Constitutional Provisions, Statutes, and Rules:

U.S. Const., amend. v, Takings Clause ..... *passim*

42 U.S.C. § 1983 13

Fed.R.Civ.P. 12(b)(6) 5

INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* are set forth in the appendix to this brief.[1]

STATEMENT OF THE CASE

Petitioners are the owners of a building located in San Francisco (the San Remo Hotel) that has been operated as a tourist hotel since the 1950s. The record is uncontested that in the decades preceding this litigation, the great majority of the Hotel's 62 rooms were rented primarily to tourists, while about 10 of the rooms were rented on a longer-term basis to residential tenants.

The City of San Francisco adopted ordinances in 1981 and 1990 (the "Hotel Ordinance") that sought to induce hotel owners to reserve units for residential tenants, in order to prevent deterioration of the residential housing stock. San Francisco officials informed Petitioners that, pursuant to the 1990 Hotel Ordinance and related zoning laws, they were no longer permitted to rent *any* of their 62 units to tourists without first obtaining a "conditional use permit."[2] Because that determination threatened the destruction of their tourist hotel business, Petitioners in 1990 applied for a permit that would

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief. Letters of consent to this filing have been lodged with the Court.

[2] The California Supreme Court later determined, as a matter of state law, that San Francisco had erred in this respect. That court determined that tourist use of the Hotel's rooms was a "permitted conditional use" -- and thus Petitioners did not need a permit to continue to rent to tourists at historic levels. Pet. App. 124a-127a & n.10.

allow them to rent all 62 units to tourists. In 1993, the San Francisco Planning Commission granted the requested permit, conditioned on Petitioners' payment of $567,000 -- supposedly to compensate San Francisco for the loss of residential units occasioned by the grant of the permit. Petitioners paid the exaction under protest.

San Remo I. Petitioners' 1993 federal court complaint challenged San Francisco's imposition of a $567,000 exaction on several grounds, including that it violated the Fifth Amendment's Takings Clause, both on its face and as applied. Following the district court's 1996 grant of summary judgment to Respondents on all claims, Petitioners appealed. The Ninth Circuit affirmed dismissal of the as-applied takings claim, citing *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), as authority for its finding that the claim was unripe -- because Petitioners had not yet sought "just compensation" from the California courts for the alleged taking. *San Remo Hotel v. City and County of San Francisco*, 143 F.3d 1095, 1102 (9th Cir. 1998) ("*San Remo I*"). The court also deemed the facial challenge unripe to the extent that it alleged that San Francisco's actions denied Petitioners all economically viable use of their property. *Id.* The court acknowledged that the facial challenge *was* ripe to the extent that it alleged that the 1990 Hotel Ordinance did not substantially advance legitimate state interests, but it invoked *Pullman* abstention[3] to defer consideration of that claim until after analogous state-law issues could be considered by state courts.

San Remo II. Petitioners filed an inverse condemnation claim in state court, arguing that article 1, section 19 of the

[3] *See Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941).

California Constitution required San Francisco to provide compensation for the $567,000 confiscated from them. Petitioners did *not* raise any federal claims in this state-court action; indeed, they specifically reserved claims under the Takings Clause until their expected return to federal court, citing *England v. Louisiana State Bd. of Medical Advisors*, 375 U.S. 411 (1964).

The California Court of Appeal reversed the trial court's grant of San Francisco's demurrer to the state constitutional claims. In March 2002, the California Supreme Court voted 4-3 to reverse the court of appeal and sustain the demurrer. Pet. App. 106a-194a ("*San Remo II*"). The court stated that San Francisco had erred in informing Petitioners that they would need to obtain a "conditional use permit" if they wished to continue renting any of their 62 rooms to tourists. *Id.* at 124a-127a & n.10. The court nonetheless held that that error did not affect the state constitutional issue because Petitioners ultimately applied for a permit to rent *all* of their units to tourists, not simply to rent to tourists at historic levels. *Id.* at 122a-130a. Because *some* units had been rented to residential tenants during the preceding decades, the court explained, Petitioners were properly required under state and local law to seek a permit if they wished to cease renting to residential tenants. *Id.*

The court next determined that for purposes of Petitioners' state constitutional claim, the $567,000 exaction should be not be subject to "heightened scrutiny." *Id.* at 130a-144a. The court had held in *Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996), that the monetary exaction imposed in that case should be subject to "heightened scrutiny" under the state

constitution.[4] But the court held that *Ehrlich*'s heightened scrutiny standard applies only when an exaction is imposed on an *ad hoc* basis by a government administrator to whom discretionary powers have been delegated. When the exaction is imposed pursuant to a legislative mandate that applies "without discretion or discrimination" to an entire class of property owners, there is no reason to apply *Ehrlich*'s heightened scrutiny, the court held. *Id.* at 137a-138a. The court instead applied "the more deferential constitutional scrutiny applicable to land use regulations made generally applicable by legislative enactment to a class of property owners." *Id.* at 137a.

Applying that deferential scrutiny, the court held that the Hotel Ordinance did not violate the state constitution, either on its face or as applied to Petitioners (in the form of a $567,000 exaction). *Id.* at 144a-155a. The court held that the housing replacement fees imposed by the Hotel Ordinance "bear a reasonable relationship" to the loss of residential housing when residential units are taken off the market and thus were not facially invalid. *Id.* at 144a. The court also held that the $567,000 exaction imposed on Petitioners bore a reasonable relationship to the loss of residential units as a result of conversion of the San Remo Hotel to an entirely tourist hotel. *Id.* at 152a-155a.

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[4] The court said that the "heightened scrutiny" it imposed in *Ehrlich* was similar to the level of scrutiny mandated by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), in cases in which a government conditions approval of a development permit on a landowner's agreement to dedicate a portion of his property to the government. *Id.* at 134a-137a. In *Nollan/Dolan*, the Court held that such conditions violate the Fifth Amendment's Takings Clause unless there is a "rough proportionality" between the exaction and the projected impact of the proposed development. *Dolan*, 512 U.S. at 386.

Justices Baxter, Chin, and Brown dissented. Justices Baxter and Chin argued that Petitioners should not have been required to pay an exaction based on the conversion of all 62 rooms to tourist use when (as all members of the court agreed) Petitioners had adequately alleged a right under state law to use as many as 53 of the 62 rooms for tourist rentals without obtaining a conditional use permit. *Id.* at 155a-174a. Justice Brown argued that the Hotel Ordinance was facially unconstitutional and thus that the entire $567,000 exaction constituted a taking in violation of the state constitution. *Id.* at 175a-194a. She argued that Petitioners did not cause, and thus are under no obligation to use their property to alleviate, San Francisco's low-income housing shortage. *Id.* at 177a. She argued that the costs of alleviating that shortage should properly be borne by all citizens rather than by a small group not responsible for its creation. *Id.* at 176a-177a.

All seven justices were in agreement that Petitioners had not raised, and that the court had not addressed, any federal constitutional issues. *Id.* at 107a n.1 (majority opinion) ("No federal question has been presented or decided in this case."); *id.* at 170a (Baxter, J., dissenting) ("Plaintiffs have reserved their federal claims and, if rebuffed here, will resume their federal litigation which is now subject to *Pullman* abstention."); *id.* at 194a (Brown, J., dissenting) ("I dissent and hope the plaintiffs find a more receptive forum in the federal courts."). None of the justices gave any indication that they thought that California law governing claim and/or issue preclusion would bar Petitioners from fully litigating their Takings Clause claim in federal court.

San Remo III. Petitioners then returned to federal court with their Takings Clause claims. In orders issued in October 2002 and April 2003, the district court granted San Francisco's motion to dismiss the complaint under Fed.R.Civ.P. 12(b)(6).

It held that: (1) the facial challenges to the Hotel Ordinance and San Francisco zoning law were time barred; and (2) all of Petitioners' claims had already been rejected by the California Supreme Court and thus were barred by the doctrine of issue preclusion. *Id.* at 53a-105a; 22a-52a.

The Ninth Circuit affirmed, finding that issue preclusion required dismissal. *Id.* at 3a-21a ("*San Remo III*").[5] The court held that although Petitioners' *England* reservation "was sufficient to avoid the doctrine of *claim* preclusion," such a reservation "does not enable them to avoid preclusion of issues actually litigated in the state forum." *Id.* at 13a, 14a. Relying on its prior decisions, the court held that issue preclusion bars litigation of a Takings Clause claim in federal court after the property owner has litigated and lost a state-law takings claim in state court, "if the state courts would give preclusive effect to the judgment of the state court and the state and federal substantive law of takings are equivalent." *Id.* at 16a.[6]

The appeals court then undertook a comparison of the California Supreme Court's interpretation of the state constitution's takings provision with the Ninth Circuit's interpretation of the Takings Clause. *Id.* at 17a-20a. Finding

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[5] The court "express[ed] no opinion on [the district court's] alternate holding regarding the statute of limitations." *Id.* at 11a.

[6] The court recognized that its holding conflicted with a Second Circuit decision on this point. *Id.* at 14a-15a (citing *Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003)). Although recognizing that *Santini* had "held that a plaintiff who must proceed to state court to ripen his takings claim under *Williamson County* should not then be precluded" from raising a Takings Clause claim in federal court, "so long as the plaintiff reserved his claim under *England*," the court held that it was bound by circuit precedent to reject *Santini*'s approach. *Id.* at 15a.

that the California Supreme Court's analysis was "equivalent to the approach taken in this circuit" -- particularly with respect to the *Nollan/Dolan* "rough proportionality" test -- the Ninth Circuit held that Petitioners' Takings Clause claims "are barred from litigation under the doctrine of issue preclusion." *Id.* at 19a, 21a.

REASONS FOR GRANTING THE PETITION

This case raises property rights issues of exceptional importance. Petitioners contend that San Francisco violated their rights under the Fifth Amendment's Takings Clause by taking $567,000 from them without providing just compensation. After 11 years of attempting to litigate that claim in federal court, Petitioners have now been told by the Ninth Circuit that they will never be permitted to do so *in any court*. The Ninth Circuit held that the doctrine of issue preclusion bars Petitioners from litigating their claim in federal court, even though the issues raised by their Takings Clause claim have not been adjudicated by any other court.

The Ninth Circuit decision is an unprecedented expansion of the issue preclusion doctrine, unwarranted by either this Court's precedents or common law understandings of that doctrine. Moreover, the decision threatens to undermine the ability of Takings Clause claimants ever to have their day in court. As the Petition well illustrates, the Ninth Circuit decision -- when read in conjunction with this Court's decision in *Williamson County* -- creates a trap that will ensnare even the most wary of claimants. *Williamson County* held that a Takings Clause claim is not ripe until a property owner has sought, and been denied, compensation from a state court pursuant to state-law remedies. But according to the Ninth Circuit, the very event that this Court viewed as a condition precedent to bringing a Takings Clause claim -- the

rejection of compensation claims by a state court -- serves to bar a property owner from ever raising his Takings Clause claim in federal court, regardless whether (as here) he explicitly reserves his right to press his federal claims in subsequent federal proceedings. Indeed, in the many states (such as California) that will not permit Takings Clause claims to be raised in state court until after state-law compensation claims have been denied, the Ninth Circuit ruling prevents property owners from raising Takings Clause claims in *any* court, whether state or federal.

As the Ninth Circuit recognized, its decision directly conflicts with a decision of the Second Circuit. Pet. App. 14a-15a. That conflict alone provides ample reason to grant the Petition. Moreover, review in this case is particularly warranted because the decision below threatens to undermine the ability of citizens to vindicate their Fifth Amendment rights. *Amici* do not mean to suggest that issue preclusion can never have any application in Takings Clause cases; but the unprecedented and sweeping manner in which the Ninth Circuit has applied that doctrine in this case cries out for review by this Court.

Petitioners seek review on a second issue as well: whether the Ninth Circuit erred in finding that exactions imposed on a property owner as a condition for receipt of a development permit are subject to more deferential review when imposed pursuant to a legislative rule rather than pursuant to an *ad hoc* administrative decision. Although this brief does not address that second issue, *amici* fully agree with Petitioners both that review of the issue is warranted and that the Ninth Circuit erred in applying a deferential standard of review. In any event, if the Court determines that review of the second issue is not warranted at this time, that

determination would in no way lessen the appropriateness and urgency of granting review on the first issue.

Finally, review is warranted because the Ninth Circuit's decision is so clearly at odds with this Court's precedents. Those precedents indicate that issue preclusion serves to bar litigation of an issue only when the *precise* issue has already been decided in a prior proceeding. Yet, there is no dispute that none of the issues raised by Petitioners in their federal court proceedings were ever precisely raised or decided by the California courts. The Ninth Circuit held merely that the California Supreme Court's determination of the state takings claims was "an equivalent determination" of Petitioners' federal Takings Clause claims. Pet. App. 17a. There is no basis under state or federal law for precluding review of a federal issue simply because a previously decided state law issue is deemed in some sense to be "equivalent."

Nor would such a doctrine serve the purposes of the issue preclusion doctrine. That judge-made doctrine is designed primarily to conserve judicial resources by relieving courts of the burden of having to decide for a second time an issue that previously was fully litigated and decided. But the Ninth Circuit's "equivalent determination" doctrine does nothing to further that goal. In every case, it will require a federal court to closely examine state court precedents construing state law takings claims and then decide whether those precedents are sufficiently similar to federal court Takings Clause decision to warrant being deemed "equivalent." There is no net savings in judicial resources; the judicial resources necessary to undertake such detailed comparisons of state and federal law are not appreciably different from the judicial resources necessary to decide a Takings Clause claim on its merits. Under those circumstances, there is simply no sound basis for denying a Takings Clause claimant his day in federal court.

I. Review Is Warranted Because the Ninth Circuit's Decision Conflicts with Other Appeals Court Decisions and Threatens to Prevent Takings Clause Claimants from Ever Having Their Day in Court

The Ninth Circuit held that the doctrine of issue preclusion barred Petitioners from raising their Takings Clause claimants in federal court, even though: (1) Petitioners initially (and properly) filed suit in federal court; (2) Petitioners later filed suit in the California courts, as they were required to do by the federal court; (3) Petitioners made clear at all times in the California court proceedings that they were *not* raising their Takings Clause claims in those proceedings but rather were reserving those claims for later federal court proceedings; and (4) the California courts acknowledged that no federal claims had been raised or were being decided and gave no indication that they believed that California issue preclusion rules would bar a later suit (in either federal or state court) raising Takings Clause claims.

In so ruling, the Ninth Circuit acknowledged that its ruling directly conflicts with the Second Circuit's *Santini* decision. . In *Santini,* property owners alleged that a Connecticut agency had effected a temporary taking of their property by naming the property as a potential site for a disposal facility, thereby rendering the property undevelopable. In order to comply with *Williamson County*'s ripeness requirement, the owners initially sought compensation in state court under state law, but reserved their federal Takings Clause claims for later proceedings. After the state courts denied compensation, the owners sought compensation in federal court under the Takings Clause. The Second Circuit held that neither claim preclusion nor issue preclusion barred the owners from raising their Takings Clause claim. *Santini,* 342 F.3d at 126-130. The court held:

> [W]e deem it appropriate to permit parties like *Santini*, who litigate state-law takings claims in state court involuntarily, to reserve their federal takings claims for determination by a federal court. It would be both ironic and unfair if the very procedures that the Supreme Court [in *Williamson County*] required Santini to follow before bringing a Fifth Amendment takings claim - a state-court inverse condemnation action - also precluded Santini from ever bringing a Fifth Amendment claim.

Id. at 130.

If anything, Petitioners have an even stronger claim to be litigating in federal court because, unlike Santini, they filed a federal court action before being relegated to state court.[7] Yet the Ninth Circuit applied issue preclusion to bar Petitioners' Takings Clause claims, all the while acknowledging that its decision directly conflicts with *Santini*. Pet. App. 14a-15a. Review is warranted to resolve that conflict.

The decision below conflicts with at least one other federal appellate decision. In *Fields v. Sarasota Manatee Airport Authority,* 953 F.2d 1299 (11th Cir. 1992), the Eleventh Circuit held that issue preclusion does not bar property owners from raising a Takings Clause case in federal court -- even though they have already lost a state-law takings claim in state court and even though "the federal takings claim is essentially the same claim as that raised in the Florida law

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[7] Moreover, the Ninth Circuit in *San Remo I* acknowledged that at least a portion of Petitioners' facial Takings Clause challenge was ripe in 1998, *San Remo I,* 145 F.3d at 1102, and thus it is incontestable that Petitioners properly invoked federal court jurisdiction at that time. Adjudication of the ripe portion of Petitioners' Takings Claim was delayed solely because the Ninth Circuit invoked *Pullman* abstention.

inverse condemnation action" -- so long as the owner has explicitly reserved in the state action his right to raise his federal claims in a later federal court action. *Fields*, 953 F.2d at 1308.[8] Although the Ninth Circuit did not cite *Fields*, the district court noted the conflict between *Fields* and the Ninth Circuit's approach. Pet. App. 39a-40a. More recently, the Sixth Circuit noted (without deciding) the split between the Second and Ninth Circuits on this issue. *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004).

In reviewing relevant case law from the federal appeals courts, *DLX* noted one issue on which the federal courts appear to be in complete agreement: *claim preclusion* does not bar filing Takings Clause claims in federal court under the facts of this case. So long as the property owner makes an *England* reservation in state court -- thereby making clear his intent to not to pursue Takings Clause claims in state court but rather to reserve those claims for a later federal court action -- the appeals courts (including the Ninth Circuit) unanimously agree that claim preclusion does not bar the later action. *DLX*, 381 F.3d at 522-23.[9] The correctness of those claim preclusion holdings is not at issue here; the Ninth Circuit explicitly noted that San Francisco "does not dispute that the plaintiffs'

[8] Because the owners had *not* made such a reservation, the Eleventh Circuit held that their claims were barred by *claim* preclusion. *Id.* at 1309.

[9] Conversely, most courts of appeals hold that if a property owner in a state court action fails to reserve his federal claims, assertion of those federal claims in a later action is barred by the doctrine of claim preclusion, which generally bars assertion of a claim in a second action that either was or could have been raise in a first action. *See, e.g., Wilkinson v. Pitkin County Bd. of County Commissioners*, 142 F.3d 1319 (10th Cir. 1998).

England reservation was sufficient to avoid the doctrine of *claim* preclusion." Pet. App. 12a-13a.

But by relying instead on the doctrine of issue preclusion to bar Petitioners' claims, the Ninth Circuit has applied that doctrine in an unprecedented manner, and in a manner that threatens to deprive property owners of all opportunity to raise Takings Clause claims.

The Ninth Circuit was correct in holding that federal constitutional claims brought in federal court are not categorically exempt from application of the issue preclusion doctrine. As the Court explained in *Allen v. McCurry*, 449 U.S. 90, 97-98 (1980):

> [N]othing in the language of [42 U.S.C.] § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion. * * * Section 1983 creates a new federal cause of action. It says nothing about the preclusive effect of state-court judgments.

But the Ninth Circuit read far too much into that decision. *Allen* said merely that the lower court had erred in finding issue preclusion categorically inapplicable to § 1983 claims, and its remand explicitly refrained from deciding whether issue preclusion applied in that case or any other specific case. *Id.* at 95 n.7 ("It must be emphasized that the question whether any exceptions or qualifications within the bounds of that doctrine might ultimately defeat a collateral estoppel defense in this case is not before us."). One exception/qualification explicitly cited by *Allen* is highly pertinent to this case:

> In the event that a § 1983 plaintiff's federal and state-law claims are sufficiently intertwined that that the federal court abstains from passing on the federal claims without first allowing the state court to address the state-law issues, the plaintiff can preserve his right to a federal forum for his federal claims by informing the state court of his intention to return to federal court on his federal claims following litigation of his state claims in state court.

Id. at 85 n.7 (citing *England,* 375 U.S. 411). Yet, the Ninth Circuit held that issue preclusion required dismissal of Petitioners' claims, despite: their initial filing in federal court; *San Remo I*'s invocation of *Pullman* abstention to send Petitioners to state court; and Petitioners' subsequent assertion of an *England* reservation before the California courts.

Moreover, the Ninth Circuit invoked issue preclusion to bar categorically any consideration of the Takings Clause claim, not merely to bar relitigation of specific factual issues decided in an earlier proceeding. The Ninth Circuit invoked issue preclusion in that latter, more limited context in *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir.) ("*Dodd II*"), *cert. denied,* 525 U.S. 923 (1998), an earlier Takings Clause case. *Dodd II* held that the Oregon Supreme Court's factual determination that the landowners retained significant residual value in their property even after new zoning rules were imposed precluded the landowners from seeking to relitigate that factual issue in federal court. *Dodd II*, 136 F.3d at 1227. But *Dodd II* declined an invitation to invoke issue preclusion to bar the landowners' Takings Clause claim based solely on the Oregon courts' denial of the landowners' analogous state-law takings claims; rather, it addressed the Takings Clause claim on the merits. *Id.* at 1229-30. The Ninth Circuit in the decision below went far beyond anything required by *Dodd II*

when it applied issue preclusion to bar all consideration of Petitioners' Takings Clause claims.[10]

That wildly expansive interpretation of issue preclusion is particularly troubling because it cuts against a basic principle undergirding *England*: in general, those asserting federal constitutional rights ought to have an opportunity to press those claims in a federal forum. *See, e.g., England*, 375 U.S. at 415 ("There are fundamental objections to any conclusion that a litigant who has invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without consent and through no fault of his own, to accept instead a state court's determination of those claims."). *See also Mitchum v. Foster,* 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of state law.").

Furthermore, the result of the Ninth Circuit's decision is to preclude direct consideration of Takings Clause claims *even in state court*, both in California and in the many other states that deem Takings Clause claims unripe in state court until after a landowner has been denied relief under state-law takings claims. *See Breneric Associates v. City of Del Mar*, 69 Cal. App. 4th 166, 188 (1998) (citing *Williamsburg County*, court holds that Takings Clause claim was unripe because state

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[10] *Cf. DLX*, 381 F.3d at 523 (Sixth Circuit declines to decide whether *Santini* is correct that issue preclusion is *never* applicable under these circumstances, but nonetheless holds that state court judgment denying state takings claims did *not* collaterally estop plaintiffs from raising Takings Clause claims in federal court, because none of *the factual issues* directly decided in the state court proceedings were relevant to the Takings Clause claims.).

courts had not yet denied landowners' state-law claims for just compensation). If the Ninth Circuit's view of issue preclusion is correct, then once such state-law claims have been denied by the state courts, landowners would be barred from raising their Takings Clause claims even in California courts. It was precisely such concerns that led the Second Circuit in *Santini* to find issue preclusion inapplicable under these circumstances. *Santini*, 342 F.3d at 128-130.[11]

In sum, review is warranted because the decision below conflicts with decisions of the Second and Eleventh Circuits and threatens to prevent Takings Clause claimants from ever having their day in federal court, or even in a state court.

II. Review Is Warranted on the Ninth Circuit's Application of Issue Preclusion, Regardless Whether the Court Is Inclined to Review the Second Issue

Amici believe that review is warranted on both issues raised by the Petition. Nonetheless, resolution of the first issue in Petitioners' favor is in no way dependent on their prevailing on the second issue. Regardless whether the Court is inclined to grant review on the second issue, it should grant review on the first issue. Unless reversed, the Ninth Circuit's breathtakingly expansive interpretation of the issue preclusion doctrine will apply to *all* Ninth Circuit litigants raising Takings Clause claims, not simply those seeking *Nollan/Dolan*

[11] *Santini* involved landowners who had litigated a state-law action in state court in Connecticut before filing a Takings Clause action in federal court. Similar to the California courts, the Connecticut courts do not permit landowners to raise Takings Clause claims in state court until after they have litigated and lost a claim for compensation under state law. *Melillo v. City of New Haven*, 249 Conn. 138, 154 n.28 (1999) (cited by *Santini*, 342 F.3d at 127).

review of exactions imposed as a condition for approval of property development.

Petitioners contend (in connection with the second issue presented) that the federal courts should have applied the *Nollan/Dolan* "rough proportionality" test to the exaction imposed upon them. But more fundamentally, Petitioners contend that the courts below erred in refusing to consider the merits of their Takings Clause claims. Regardless of what level of scrutiny the federal courts apply to those claims, Petitioners most basic desire is that the federal courts at least consider those claims on their merits.

The California Supreme Court decision well illustrates that Petitioners have substantial arguments that their Fifth Amendment rights were violated, even if the Ninth Circuit were correct (which it is not) that the *Nollan/Dolan* rough proportionality test is inapplicable. For example, Justice Baxter (joined by Justice Chin) agreed with the majority that state takings law did not require that anything akin to the "rough proportionality" test be applied to the exaction imposed on Petitioners. Pet. App. 164a. They nonetheless dissented from the dismissal of Petitioners' takings claims because in their view, if the facts were as alleged by Petitioners, the exaction imposed on Petitioners was unconstitutionally excessive even under the "reasonable relationship" test that they proposed. *Id.* at 168a-174a. Similarly, as Justice Brown articulated in her dissent, there is a strong argument that the decision-making process by which San Francisco imposed a $567,000 exaction on Petitioners was adjudicative in nature, not legislative. *Id.* at 180a. Justice Brown's dissent thus demonstrates that, even under the Ninth Circuit's view of *Nollan/Dolan*, there is a strong argument to be made that *Nollan/Dolan*'s "rough proportionality" test should be applied to the exaction imposed on Petitioners.

But, of course, Petitioners were never permitted to make those arguments to the Ninth Circuit. Instead, the court dismissed this case under the issue preclusion doctrine without ever reaching the merits of Petitioners' Takings Clause claims. Review of Issue One is warranted to determine whether the Ninth Circuit properly precluded consideration of those claims, without regard to the legal standards ultimately applied to those claims.

III. Review Is Warranted Because the Ninth Circuit's Decision Is So at Odds With This Court's Issue Preclusion Precedents

Review is also warranted because the Ninth Circuit's decision is so clearly at odds with this Court's issue preclusion precedents. Those precedents indicate that issue preclusion serves to bar litigation of an issue only when the *precise* issue has already been decided in a prior proceeding. Yet, the Ninth Circuit invoked issue preclusion here even though there is no dispute that *none* of the federal Takings Clause issues raised by Petitioners in their federal court proceedings were ever precisely raised or decided by the California courts.

This Court has explained that "under collateral estoppel [issue preclusion], once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior action." *Montana v. United States*, 440 U.S. 147, 153 (1979). The Court has not hesitated to deny application of issue preclusion where an issue was not "actually" and "necessarily" determined in the prior proceeding. *Haring v. Prosise*, 462 U.S. 306, 316 (1983). Moreover, issue preclusion doctrine is applicable *only* "when the question upon which the recovery of the second demand depends has under *identical*

circumstances and conditions been previously concluded by a judgment" in prior proceedings. *United States v. Moser*, 266 U.S. 236, 241-42 (1924) (emphasis added).

The Ninth Circuit did not assert that the issues whose litigation it precluded had actually been determined in a prior proceeding. Instead, it held merely that the California Supreme Court's determination of the state-law takings claims was "an equivalent determination" of Petitioners' federal Takings Clause claims. Pet. App. 17a. There is no basis under state or federal law for precluding review of a federal issue simply because a previously decided state-law issue is deemed in some sense to be "equivalent."

Indeed, the Ninth Circuit did not cite any California case law in support of its "equivalent determination" standard.[12] Instead, it borrowed that language from a previous Ninth Circuit decision, *Dodd v. Hood River County*, 59 F.3d 852, 863 (1995) ("*Dodd I*"). But *Dodd I* cited no precedent for its "equivalent determination" language, and certainly none deriving from either California law or the law of Oregon (the state from which *Dodd I* arose). It appears that the Ninth Circuit, rather than looking to applicable state law to determine the scope of issue preclusion, has simply crafted its own circuit-wide issue preclusion rule that has the effect of preventing Takings Clause claimants from ever bringing their claims into federal court.

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[12] The only California decision cited by the Ninth Circuit regarding when California courts apply issue preclusion is *Stolz v. Bank of America*, 15 Cal. App. 4th 217, 222 (1993). But as the Ninth Circuit conceded, *Stolz* held that issue preclusion applies only when the issue decided in the prior proceeding is "identical" to the issue arising in the later proceeding. Pet. App. 15a.

The Ninth Circuit issue preclusion rule not only is contrary to precedent, but does not appear to serve any of the purposes for which courts have crafted the issue preclusion doctrine. Claim and issue preclusion are intended to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication." *Allen,* 449 U.S. at 94. The Ninth Circuit "equivalent determination" rule does nothing to prevent "inconsistent decisions," because there is no necessary inconsistency between a finding that a state has not violated state takings law and a later finding that the same state action violated the federal Takings Clause. Nor does the rule "conserve judicial resources." In every case, the "equivalent determination" rule will require a federal court to examine closely state court precedents construing state law takings claims and then decide whether those precedents are sufficiently similar to federal court Takings Clause decision to warrant being deemed "equivalent." There is no net savings in judicial resources; the judicial resources necessary to undertake such detailed comparisons of state and federal law are not appreciably different from the judicial resources necessary to decide a Takings Clause claim on its merits. Under those circumstances, there is simply no sound basis for denying a Takings Clause claimant his day in federal court.

In sum, review is warranted because the issue preclusion rule established by the Ninth Circuit is inconsistent with this Court's precedents, does not appear to derive from the issue preclusion rules of any state, and does not serve any of the purposes underlying issue preclusion doctrine.

CONCLUSION

Amici curiae request that the Court grant the Petition.

Respectfully submitted,

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Date: November 12, 2004

APPENDIX

APPENDIX A

INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states, including many in the State of California. WLF has appeared before this Court in numerous cases involving claims arising under the Fifth Amendment's Takings Clause. *See, e.g., Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *McQueen v. South Carolina Coastal Council*, 354 S.C. 142, *cert. denied*, 124 S. Ct. 466 (2003). WLF filed a brief in this case when it was before the California Supreme Court.

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and professional organizations of every size, in every sector of business, and from every region of the country, and has several thousand members in California. An important function of the Chamber is to represent the interests of its members in court on issues of national concern to the business community.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The American Association of Small Property Owners (AASPO) is a nonpartisan, nonprofit § 501(c)(3) corporation. Since 1993, AASPO has been working for the right of small property owners to prosper freely and fairly -- to make possible the American dream of building wealth though real

estate. Based in Washington, DC, AASPO has chapters or affiliates in more than 25 states.

The National Taxpayers Union (NTU) is a nonprofit citizen group founded in 1969 to work for lower taxes, smaller government, and more accountability from elected officials. Headquartered in Alexandria, Virginia, NTU has 350,000 members nationwide.

Anthony Palazzolo is a Rhode Island property owner. He was the petitioner in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), a case that decided important issues under the Fifth Amendment's Takings Clause. He believes that the hostile treatment his Takings Clause claims received in Rhode Island state courts well illustrates the need to preserve a federal forum in which such claims can be raised.

The Property Rights Foundation of America, Inc. (PRFA) is a nonprofit organization based in New York State and dedicated to providing information and education and promoting understanding about the fundamental constitutional rights of America's citizens, especially the right to own and use private property. PRFA is a volunteer, grass-roots organization committed to assisting citizens, policy-makers, and those in the media concerned with protecting the rights of property owners against government abuse.

The South Carolina Landowners Association, Inc. (SCLA) is a statewide nonprofit grassroots organization dedicated solely to the promotion and protection of property rights through research, analysis, and education. SCLA joins this brief because it maintains that a property owner should not be barred from raising Fifth Amendment Takings Clause claims solely because similar claims under state law have been previously rejected.

Supreme Court, U.S.
FILED
JAN 24 2005
OFFICE OF THE CLERK

(23)

No. 04-340

In the Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T&R INVESTMENT CORP.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed September 7, 2004
Petition for Certiorari Granted December 10, 2004

TABLE OF CONTENTS

Relevant Docket Entries . . . . . J.A. 1

Portions of Appellants' Opening Brief filed in the Ninth Circuit on Jan. 13, 1997 (Cover, Table of Contents and pages 2 and 18-21) . . . . . J.A. 50

Portions of Appellants' Reply Brief filed in the Ninth Circuit on March 12, 1997 (Cover, Table of Contents and pages 1-2 and 8-10) . . . . . J.A. 60

Third Amended Complaint filed in the District Court on Nov. 14, 2002 . . . . . J.A. 69

Second Amended Complaint originally filed in state court, filed as part of a Request for Judicial Notice in the District Court on Dec. 9, 2002 . . . . . J.A. 96

United States Supreme Court Order Granting Petition for Writ of Certiorari Limited to Question 1 Presented dated Dec. 10, 2004 . . . . J.A. 129

The following opinions, orders, and ordinance have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Appendix A - Ninth Circuit Order Denying Petition for Rehearing *En Banc* dated 6/9/04 . . . . . 1a

Appendix B - Ninth Circuit Opinion dated 4/14/04 . . . . . 3a

Appendix C - District Court Order dated 4/16/03 . . . . . 22a

Appendix D - District Court Order dated 10/15/02 . . . . . 53a

Appendix E - Supreme Court of California Opinion dated 3/4/02 . . . . . 106a

Appendix F - San Francisco Residential Hotel Unit Conversion and Demolition Ordinance 195a

RELEVANT DOCKET ENTRIES

United States District Court for the Northern District of California (Oakland) **93-cv-1644**

5/4/93	1	COMPLAINT (Summons(es) issued) Fee status pd entered on 5/4/93 in the amount of $ 120.00 (Receipt No. 102052); jury demand (lrc) [Entry date 05/06/93]
5/4/93	2	CASE MANAGEMENT SCHEDULING ORDER by Senior Judge William H. Orrick: Proof of service to be filed by 6/18/93; counsels' case management statement to be filed by 8/23/93; initial case management conference will be held 2:00 9/2/93. (cc: all counsel) (lrc) [Entry date 05/06/93]
5/4/93	3	NOTICE by plaintiff of related case(s) C-91-4360 JPV (lrc) [Entry date 05/06/93]
5/11/93	4	ORDER by Judge John P. Vukasin Jr. granting related case notice [3-1] Case reassigned to Judge John P. Vukasin Jr., relating case with member cases C-91-3386 and C-91-4360 (Date Entered: 5/17/93) (cc: all counsel) (mcl) [Entry date 05/17/93] [Edit date 05/17/93]
7/1/93	5	MOTION before Judge John P. Vukasin Jr. by plaintiff The San Remo Hotel, plaintiff Thomas Field, plaintiff Robert Field, plaintiff T & R Investment Cor for preliminary injunction with Notice set for

		7/29/93 at 10:00 (jlw) [Entry date 07/02/93]
7/1/93	6	REQUEST for Preliminary Injunction by plaintiff The San Remo Hotel, plaintiff Thomas Field, plaintiff Robert Field, plaintiff T & R Investment Cor in support of motion for preliminary injunction (jlw) [Entry date 07/02/93]
7/1/93	7	MEMORANDUM by plaintiff The San Remo Hotel, plaintiff Thomas Field, plaintiff Robert Field, plaintiff T & R Investment Cor in support of motion for preliminary injunction [5-1] (jlw) [Entry date 07/02/93]
7/1/93	8	DECLARATION by Andrew M. Zacks on behalf of plaintiff The San Remo Hotel, plaintiff Thomas Field, plaintiff Robert Field, plaintiff T & R Investment Cor re motion for preliminary injunction [5-1] (jlw) [Entry date 07/02/93]
7/1/93	--	RECEIVED Order (plaintiff The San Remo Hotel, plaintiff Thomas Field, plaintiff Robert Field, plaintiff T & R Investment Cor) re: [5-1] (jlw) [Entry date 07/02/93]
7/1/93	9	RETURN OF SERVICE executed upon defendant San Francisco, City on 6/23/93 (mcl) [Entry date 07/02/93]

7/7/93	10	PROOF OF SERVICE by plaintiff The San Remo Hotel, plaintiff Thomas Field, plaintiff T & R Investment Cor of Notice & Motion, Declaration, Memorandum, Request for Judicial Notice, and Proposed Order (jlw) [Entry date 07/08/93]
7/8/93	11	MOTION before Judge John P. Vukasin Jr. by defendant San Francisco, City to continue hearing on motion for preliminary injunction (jlw) [Entry date 07/09/93]
7/8/93	12	EX-PARTE APPLICATION before Judge John P. Vukasin Jr. by defendant San Francisco, City to shorten time on motion for preliminary injunction [5-1] (jlw) [Entry date 07/09/93]
7/8/93	13	MEMORANDUM by defendant San Francisco, City in support of motion to continue hearing on motion for preliminary injunction [11-1] (jlw) [Entry date 07/09/93]
7/12/93	14	OPPOSITION by plaintiff The San Remo Hotel, plaintiff Thomas Field, plaintiff Robert Field, plaintiff T & R Investment Cor to motion to continue hearing on motion for preliminary injunction [11-1] (jlw) [Entry date 07/13/93]
7/12/93	15	DECLARATION by Andrew Zacks on behalf of plaintiff The San Remo Hotel, plaintiff Thomas Field, plaintiff Robert Field, plaintiff T & R Investment Cor re

motion to continue hearing on motion for preliminary injunction [11-1] (jlw) [Entry date 07/13/93]

7/15/93 16 MEMORANDUM by defendant San Francisco, City in opposition to motion for preliminary injunction [5-1] (jlw) [Entry date 07/16/93]

7/15/93 17 DECLARATION by Bernard Tom on behalf of defendant San Francisco, City re motion for preliminary injunction [5-1] (jlw) [Entry date 07/16/93]

7/15/93 18 DECLARATION by Robert W. Passmore on behalf of defendant San Francisco, City re motion for preliminary injunction [5-1] (jlw) [Entry date 07/16/93]

7/19/93 19 NOTICE of Association of Counsel by plaintiffs The San Remo Hotel et al (jlw) [Entry date 07/20/93]

7/22/93 20 REPLY MEMORANDUM by plaintiffs The San Remo Hotel et al in support of motion for preliminary injunction [5-1] (jlw) [Entry date 07/27/93]

7/22/93 21 REPLY DECLARATION by Andrew M. Zacks on behalf of plaintiff The San Remo Hotel re motion for preliminary injunction [5-1] (jlw) [Entry date 07/27/93]

7/22/93 22 REPLY DECLARATION by Thomas Field on behalf of plaintiffs The San Remo

Hotel et al re motion for preliminary injunction [5-1] (jlw) [Entry date 07/27/93]

7/26/93 23 MOTION before Judge John P. Vukasin Jr. for leave to file amicus curiae brief with Notice set for 7/26/93 at 10:00 (jlw) [Entry date 07/28/93]

7/26/93 -- RECEIVED Amicus Curiae Brief re: [23-1] (jlw) [Entry date 07/28/93]

7/26/93 24 PROOF OF SERVICE of Motion for leave to file Brief and Brief (jlw) [Entry date 07/28/93]

7/26/93 -- RECEIVED Consent for Pacific Legal Foundation as amicus curiae re: [23-1] (jlw) [Entry date 07/28/93]

7/27/93 25 MOTION before Judge John P. Vukasin Jr. by defendant San Francisco, City to dismiss complaint or to stay with Notice set for 9/9/93 at 10:00 (jlw) [Entry date 07/29/93]

7/27/93 26 MEMORANDUM by defendant San Francisco, City in support of motion to dismiss complaint [25-1], of motion to stay [25-2] (jlw) [Entry date 07/29/93]

7/27/93 27 REQUEST by defendant San Francisco, City for Judicial Notice in support of motion to dismiss or for stay (jlw) [Entry date 07/29/93]

7/27/93	--	RECEIVED Order (defendant San Francisco, City) re: [25-1] (jlw) [Entry date 07/29/93]
7/28/93	28	MOTION before Judge John P. Vukasin Jr. by defendant San Francisco, City to continue motion for preliminary injunction and for leave to file additional brief with Notice set for 7/29/93 at 10:00 (jlw) [Entry date 07/29/93]
8/2/93	29	OPPOSITION by plaintiffs The San Remo Hotel et al to motion to continue motion for preliminary injunction [28-1], motion for leave to file additional brief [28-2] (jlw) [Entry date 08/06/93]
8/2/93	30	DECLARATION by Andrew Zacks on behalf of plaintiffs The San Remo Hotel et al re motion to continue motion for preliminary injunction [28-1], re motion for leave to file additional brief [28-2] (jlw) [Entry date 08/06/93]
8/4/93	31	REPLY by defendant SF City & County re opposition [29-1] (jlw) [Entry date 08/06/93]
8/26/93	32	MEMORANDUM by plaintiff The San Remo Hotel, plaintiff Thomas Field, plaintiff Robert Field, plaintiff T & R Investment Cor in opposition to motion to dismiss complaint [25-1] (jlw) [Entry date 08/27/93]

9/2/93	33	REPLY MEMORANDUM by defendant SF City & County re motion to dismiss complaint [25-1], re motion to stay [25-2] (jlw) [Entry date 09/03/93]
9/16/93	34	ORDER by Judge John P. Vukasin Jr. denying defendant's motion to dismiss complaint [25-1], granting plaintiff's motion for preliminary injunction [5-1] (Date Entered: 9/16/93) (cc: all counsel) (jlw) [Entry date 09/20/93]
9/21/93	35	NOTICE OF APPEAL by defendant SF City & County from Dist. Court decision order [34-1] paid, receipt #31092 (jlw)[Entry date 09/23/93]
9/21/93	36	APPLICATION for a Stay re: Order granting plaintiff' motion for preliminary injunction by defendant SF City & County (jlw) [Entry date 09/23/93]
9/23/93	--	Docket fee notification form and case information sheet to USCA [35-1] (jlw)
9/23/93	--	Copy of notice of appeal and docket sheet to all counsel (jlw)
9/28/93	37	ORDER Case reassigned to Judge D. L. Jensen All dates remain in effect unless otherwise ordered by Judge Jensen. (Date Entered: 9/29/93) (cc: all counsel) (fw) [Entry date 09/29/93]

9/28/93	38	NOTICE of USCA Orders denying stay by plaintiff The San Remo Hotel (jlw) [Entry date 10/01/93]
9/30/93	39	NOTICE by plaintiff The San Remo Hotel, plaintiff Thomas Field, plaintiff Robert Field, plaintiff T & R Investment Cor (jlw) [Entry date 10/01/93]
10/8/93	40	ANSWER by defendant SF City & County to complaint [1-1] (fw) [Entry date 10/12/93]
10/14/93	--	NOTIFICATION by Circuit Court of Appellate Docket Number 93-16733 (appeal filed 9/21/93) (fw) [Entry date 10/18/93]
10/19/93	41	CLERK'S NOTICE Status conference set for 10:00 11/10/93 ; counsel to file status statement by 11/3/93. (fw) [Entry date 10/21/93]
10/19/93	42	LETTER dated 10/8/93 from Paul Utrecht to Judge Jensen re request to hold status conference 12/8/93 at 3:30pm; request that matter be set for settlement conference. (fw) [Entry date 10/25/93]
10/26/93	43	CERTIFIED COPY of USCA Order: Case 93-16793 having been opened in error is hereby dismissed. Case number 93-16733 has been determined to be the only notice of appeal filed in this District Court case on 9/21/93 and shall proceed.

A certified copy of this order served on district court shall act as mandate of this court. (fw) [Entry date 10/29/93]

10/29/93	44	CLERK's letter spreading the mandate to counsel. re appeal [35-1] (fw)
11/8/93	45	CLERK'S NOTICE Status conference previously set for 11/10/93 rescheduled to 10:00 12/15/93 ; Status statements filed by 12/8/93. Briefing on plaintiff's motion for preliminary injunction in C-91-3386-DLJ in accordance with Court's Local rules. [3:93-cv-01644] (fw) [Entry date 11/09/93]
11/15/93	46	CERTIFIED COPY of USCA Order: dismissing the appeal [35-1] re appeal 93-16733 [3:93-cv-01644] (fw)[Entry date 12/06/93]
12/6/93	47	CLERK's letter spreading the mandate to counsel. re appeal [35-1] [3:93-cv-01644] (fw)
12/7/93	--	RECEIVED Substitution Attorneys submitted by defendant SF City & County in 3:93-cv-01644 [3:93-cv-01644] (fw) [Entry date 12/09/93]
12/8/93	48	STATUS CONFERENCE STATEMENT by plaintiff The San Remo Hotel in 3:93-cv-01644, plaintiff Thomas Field in 3:93-cv-01644, plaintiff Robert Field in 3:93-cv-01644, plaintiff T & R Investment

		Cor in 3:93-cv-01644 [3:93-cv-01644] (fw) [Entry date 12/09/93]
12/8/93	49	STATUS CONFERENCE STATEMENT by defendant SF City & County in 3:93-cv-01644 [3:93-cv-01644] (fw) [Entry date 12/09/93]
12/15/93	50	MINUTES: (C/R Rosita Flores) Status conference held; Status conference set for 10:00 1/19/94 ; [3:93-cv-01644] (fw) [Entry date 12/17/93]
12/16/93	51	ORDER by Judge D. L. Jensen withdrawing and substituting attorney Andrew W. Schwartz (Date Entered: 12/17/93) (cc: all counsel) [3:93-cv-01644] (fw) [Entry date 12/17/93]
12/22/93	52	NOTICE AND MOTION before Judge D. L. Jensen by plaintiff The San Remo Hotel in 3:93-cv-01644, plaintiff Thomas Field in 3:93-cv-01644, plaintiff Robert Field in 3:93-cv-01644, plaintiff T & R Investment Cor in 3:93-cv-01644 for leave to file amended and supplemental complaint with Notice set for 1/19/94 at 10:00am [3:93-cv-01644] (fw) [Entry date 12/23/93]
12/22/93	53	MEMORANDUM by plaintiff The San Remo Hotel in 3:93-cv-01644, plaintiff Thomas Field in 3:93-cv-01644, plaintiff Robert Field in 3:93-cv-01644, plaintiff T & R Investment Cor in 3:93-cv-01644 in

		support of motion for leave to file amended and supplemental complaint [52-1] [3:93-cv-01644] (fw) [Entry date 12/23/93]
12/22/93	54	DECLARATION by Andrew M. Zacks on behalf of plaintiff The San Remo Hotel in 3:93-cv-01644, plaintiff Thomas Field in 3:93-cv-01644, plaintiff Robert Field in 3:93-cv-01644, plaintiff T & R Investment Cor in 3:93-cv-01644 re motion for leave to file amended and supplemental complaint [52-1] [3:93-cv-01644] (fw) [Entry date 12/23/93]
12/22/93	--	RECEIVED Order (plaintiff The San Remo Hotel in 3:93-cv-01644, plaintiff Thomas Field in 3:93-cv-01644, plaintiff Robert Field in 3:93-cv-01644, plaintiff T Investment Cor in 3:93-cv-01644) re: [52-1] [3:93-cv-01644] (fw) [Entry date 12/23/93]
1/5/94	55	RESPONSE - non-opposition by defendant SF City & County in 3:93-cv-01644 re motion for leave to file amended and supplemental complaint [52-1] [3:93-cv-01644] (fw) [Entry date 01/06/94]
1/19/94	56	MINUTES: (C/R Angie Roberts) Status conference held; that the motion for leave to file amended and supplemental complaint [52-1] is submitted Status conference set for 8:30 3/23/94 ; [3:93-cv-01644] (fw) [Entry date 01/21/94]

1/19/94	57	ORDER by Judge D. L. Jensen granting motion for leave to file amended and supplemental complaint [52-1] (Date Entered: 1/21/94) (cc: all counsel) [3:93-cv-01644] (fw) [Entry date 01/21/94]
1/24/94	58	FIRST AMENDED AND SUPPLEMENTAL COMPLAINT [1-1] by plaintiff The San Remo Hotel in 3:93-cv-01644, plaintiff Thomas Field in 3:93-cv-01644, plaintiff Robert Field in 3:93-cv-01644, plaintiff T & R Investment Cor in 3:93-cv-01644 [3:93-cv-01644] (fw) [Entry date 01/25/94]
1/28/94	59	ANSWER by defendant SF City & County in 3:93-cv-01644 to First Amended and Supplemental complaint [58-1] [3:93-cv-01644] (fw) [Entry date 01/31/94]
2/2/94	60	NOTICE OF MOTION AND MOTION before Judge D. L. Jensen by plaintiff The San Remo Hotel in 3:93-cv-01644, plaintiff Thomas Field in 3:93-cv-01644, plaintiff Robert Field in 3:93-cv-01644, plaintiff T & R Investment Cor in 3:93-cv-01644 for partial summary judgment as to 6th Count with Notice set for 3/2/94 at 10:00am [3:93-cv-01644] (fw)
2/2/94	61	MEMORANDUM by plaintiff The San Remo Hotel in 3:93-cv-01644, plaintiff Thomas Field in 3:93-cv-01644, plaintiff Robert Field in 3:93-cv-01644, plaintiff T

		& R Investment Cor in 3:93-cv-01644 in support of motion for partial summary judgment as to 6th Count [60-1] [3:93-cv-01644] (fw)
2/2/94	62	REQUEST FOR JUDICIAL NOTICE by plaintiff The San Remo Hotel in 3:93-cv-01644, plaintiff Thomas Field in 3:93-cv-01644, plaintiff Robert Field in 3:93-cv-01644, plaintiff T & R Investment Cor in 3:93-cv-01644 [3:93-cv-01644] (fw)
2/2/94	63	DECLARATION by Andrew M. Zacks on behalf of plaintiff The San Remo Hotel in 3:93-cv-01644, plaintiff Thomas Field in 3:93-cv-01644, plaintiff Robert Field in 3:93-cv-01644, plaintiff T & R Investment Cor in 3:93-cv-01644 re motion for partial summary judgment as to 6th Count [60-1] [3:93-cv-01644] (fw)
2/2/94	--	RECEIVED Order (plaintiff The San Remo Hotel in 3:93-cv-01644, plaintiff Thomas Field in 3:93-cv-01644, plaintiff Robert Field in 3:93-cv-01644, plaintiff T & R Investment Cor in 3:93-cv-01644) re: [60-1] [3:93-cv-01644] (fw)
2/11/94	64	PROOF OF SERVICE by plaintiff The San Remo Hotel in 3:93-cv-01644, plaintiff Thomas Field in 3:93-cv-01644, plaintiff Robert Field in 3:93-cv-01644, plaintiff T & R Investment Cor in 3:93-cv-01644 of Papers in support of motion for partial summary judgment at to 6th cause of

action. [3:93-cv-01644] (fw) [Entry date 02/14/94]

2/16/94 65 MEMORANDUM by defendant SF City & County in 3:93-cv-01644 in opposition to motion for partial summary judgment as to 6th Count [60-1] [3:93-cv-01644] (fw) [Entry date 02/17/94]

2/16/94 66 DECLARATION by Andrew W. Schwartz on behalf of defendant SF City & County in 3:93-cv-01644 re opposition memorandum [65-1] [3:93-cv-01644] (fw) [Entry date 02/17/94]

2/16/94 -- RECEIVED Order denying plaintiffs' motion for partial summary judgment (defendant SF City & County in 3:93-cv-01644) re: [65-1] [3:93-cv-01644] (fw) [Entry date 02/17/94]

2/18/94 67 AMENDED MEMORANDUM by plaintiff The San Remo Hotel in 3:93-cv-01644, plaintiff Thomas Field in 3:93-cv-01644, plaintiff Robert Field in 3:93-cv-01644, plaintiff T & R Investment Cor in 3:93-cv-01644 in support of motion for partial summary judgment as to 6th Count [60-1] [3:93-cv-01644] (fw) [Entry date 02/22/94]

2/24/94 68 STIPULATION and ORDER by Judge D. L. Jensen : setting hearing on motion for partial summary judgment as to 6th Count

[60-1] 10:00 3/9/94 (cc: all counsel) [3:93-cv-01644] (fw) [Entry date 02/25/94]

3/2/94 69 REPLY declaration of Andrew M. Zacks by plaintiff The San Remo Hotel in 3:93-cv-01644, plaintiff Thomas Field in 3:93-cv-01644, plaintiff Robert Field in 3:93-cv-01644, plaintiff T & R Investment Cor in 3:93-cv-01644 re motion for partial summary judgment as to 6th Count [60-1] [3:93-cv-01644] (fw) [Entry date 03/03/94]

3/2/94 70 REPLY by plaintiff The San Remo Hotel plaintiff Thomas Field in 3:93-cv-01644, plaintiff Robert Field in 3:93-cv-01644, plaintiff T & R Investment Cor in 3:93-cv-01644 re motion for partial 6th Count [60-1] [3:93-cv-01644] (fw) [Entry date 03/03/94]

3/8/94 71 ORDER by Judge D. L. Jensen Cases C-94-0435-WHO and C-93-1644-DLJ are NOT related. (Date Entered: 3/8/94) (cc: all counsel) [3:93-cv-01644] (fw)

3/8/94 72 ORDER by Judge D. L. Jensen relating cases C-94-0629-SBA; C-93-1644-DLJ; C-91-4360-DLJ and C-91-3386-DLJ (Date Entered: 3/9/94) (cc:all counsel) [3:93-cv-01644] (fw) [Entry date 03/09/94]

3/17/94 73 STATUS CONFERENCE STATEMENT by defendant SF City & County in 3:93-cv-01644 [3:93-cv-01644] (fw) [Entry date 03/18/94]

3/22/94	74	STATUS CONFERENCE STATEMENT by plaintiff The San Remo Hotel in 3:93-cv-01644, plaintiff Thomas Field in 3:93-cv-01644, plaintiff Robert Field in 3:93-cv-01644, plaintiff T & R !nvestment Cor in 3:93-cv-01644 [3:93-cv-01644] (fw) [Entry date 03/23/94]
3/30/94	76	MINUTES: (C/R Candace Yount) Status conference held; that the motion for partial summary judgment as to 6th Count [60-1] is submitted Status conference set for 10:00 4/20/94 ; [3:93-cv-01644] (fw) [Entry date 04/01/94]
3/31/94	75	ORDER by Judge D. L. Jensen denying motion for partial summary judgment as to 6th Count [60-1] (Date Entered: 4/1/94) (cc: all counsel) [3:93-cv-01644] (fw) [Entry date 04/01/94]
4/20/94	77	MINUTES: (C/R Rosita Flores) Status conference set for 3:30 5/25/94 ; [3:93-cv-01644] (mcl) [Entry date 04/22/94]
5/13/94	78	CLERK'S NOTICE Status conference set for 5/25/94 is rescheduled to 4:00 5/26/94; [3:93-cv-01644] (fw) [Entry date 05/17/94]
6/2/94	79	MINUTES: of 5/31/94 (C/R Carl Pline) Status conference held; Status conference set for 3:00 7/20/94 ; [3:93-cv-01644] (fw) [Entry date 06/03/94]

6/2/94	80	CLERK'S NOTICE Further Status conference set for 3:00 7/20/94; [3:93-cv-01644] (fw) [Entry date 06/07/94]
7/20/94	81	MINUTES: (C/R Carol Karen) Status conference held; Order to be prepared by Court. [3:93-cv-01644] (fw) [Entry date 07/21/94]
10/26/94	82	NOTICE by Plas in 3:93-cv-01644 of change of attys' address to: Andrew M. Zacks; Law Offices of Andrew M. Zacks; Paul F. Utrecht; Law Offices of Paul F. Utrecht; 235 Montgomery Street; Suite 1159; San Francisco, CA 94104 [3:93-cv-01644] (mh) [Entry date 11/02/94]
10/31/94	83	ORDER by Judge D. L. Jensen relating case C91-2001DLJ, C91-3386DLJ (see order for other member cases) (Date Entered: 11/7/94) (cc: all counsel) [3:93-cv-01644] (cg) [Entry date 11/07/94]
12/30/94	84	NOTICE by Plaintiff The San Remo Hotel, Plaintiff Thomas Field, Plaintiff Robert Field, Plaintiff T & R Investment Cor of change of address [4:93-cv-01644] (kk) [Entry date 01/10/95]
12/30/94	85	NOTICE by Plaintiff of change of address [4:93-cv-01644] (kk) [Entry date 01/10/95]

5/8/95	86	NOTICE by Plas of change of atty's address [4:93-cv-01644] (mh) [Entry date 05/11/95]
11/8/95	87	MOTION before Judge D. L. Jensen by defendant SF City and County for summary judgment with Notice set for 12/13/95 at 10am [4:93-cv-01644] (mh) [Entry date 11/13/95]
11/8/95	88	MEMORANDUM by defendant SF City and County in support of motion for summary judgment [87-1] [4:93-cv-01644] (mh) [Entry date 11/13/95]
11/8/95	89	DECLARATION by Rosemary Bosque on behalf of defendant SF City and County re motion for summary judgment [87-1] [4:93-cv-01644] (mh) [Entry date 11/13/95]
11/8/95	90	DECLARATION by Lawrence B. Badiner on behalf of defendant SF City and County re motion for summary judgment [87-1] [4:93-cv-01644] (mh) [Entry date 11/13/95]
11/8/95	91	REQUEST FOR JUDICIAL NOTICE by defendant SF City and County [4:93-cv-01644] (mh) [Entry date 11/13/95]
11/14/95	92	ORDER by Judge D. L. Jensen referring this case to the Chief Mag Judge for the purposes of discovery (Date Entered:

		11/16/95) (cc: all counsel) [4:93-cv-01644] (mh) [Entry date 11/16/95]
11/16/95	--	REFERRAL: referring case for discovery to Mag. Judge F. S. Langford [4:93-cv-01644] (wh)
11/21/95	93	STIPULATION and ORDER by Judge D. L. Jensen : Defendant City & County of SF's motion for summary judgment will be heard by 10:00 1/3/96 ; (cc: all counsel) [4:93-cv-01644] (mh) [Entry date 11/24/95]
11/30/95	94	MEMORANDUM by Plaintiff in support of motion to compel answers to deposition questions [4:93-cv-01644] (mh) [Entry date 12/06/95]
11/30/95	95	PROOF OF SERVICE by Plaintiff of Motion to compel answers & documents thereof [4:93-cv-01644] (mh) [Entry date 12/06/95]
12/5/95	96	MOTION before Judge D. L. Jensen by Plaintiff to continue hearing on the motion for summary judgment with Notice set for 12/8/95 [4:93-cv-01644] (mh) [Entry date 12/06/95]
12/5/95	97	DECLARATION by Paul F. Utrecht on behalf of Plaintiff re motion to continue hearing on the motion for summary

judgment [96-1] [4:93-cv-01644] (mh) [Entry date 12/06/95]

12/5/95 98 PROOF OF SERVICE by Plaintiff of #96 & #97 [4:93-cv-01644] (mh) [Entry date 12/06/95]

12/7/95 99 ORDER by Judge D. L. Jensen granting Plaintiff's motion to continue hearing on the motion for summary judgment [96-1] Plaintiff San Remo Hotel's Motion for summary judgment will be heard by 10am 2/7/96 (Date Entered: 12/8/95) (cc: all counsel) [4:93-cv-01644] (mh) [Entry date 12/08/95]

12/8/95 100 OPPOSITION by defendant SF City and County to the motion to continue the hearing on City's motion for summary judgment [4:93-cv-01644] (mh)

1/3/96 101 STIPULATION and ORDER by Judge D. L. Jensen : City's Motion for summary judgment will be heard by 10am 3/27/96 ; (cc: all counsel) [4:93-cv-01644] (mh) [Entry date 01/04/96]

1/18/96 102 MEMORANDUM by defendant SF City and County in opposition to the motion to compel answer to deposition questions [4:93-cv-01644] (mh) [Entry date 01/23/96]

1/18/96 103 DECLARATION by Ted Dienstfrey on behalf of defendant SF City and County in

opposition to motion to compel answers to deposition question [4:93-cv-01644] (mh) [Entry date 01/23/96]

1/25/96 104 REPLY MEMORANDUM by Plaintiff in support of motion to compel answers to deposition questions [4:93-cv-01644] (mh) [Entry date 01/29/96]

1/25/96 105 PROOF OF SERVICE by Plaintiff of of the reply memorandum in support of motion to compel & the Reply declaration of Andrew M. Zacks [4:93-cv-01644] (mh) [Entry date 01/29/96]

1/25/96 106 REPLY DECLARATION by Andrew M. Zacks on behalf of Plaintiff [4:93-cv-01644] (mh) [Entry date 01/29/96]

2/8/96 107 MINUTES: before Mag Judge Langford (C/R Tape 96-2) Plaintiff's motion to compel deposition answers is submitted [4:93-cv-01644] (mh) [Entry date 02/13/96]

2/14/96 108 MEMORANDUM by defendant SF City and County in support of motion for summary judgment [87-1] [4:93-cv-01644] (mh) [Entry date 02/22/96]

2/28/96 109 ORDER by Chief Mag. Judge F. S. Langford GRANTING plaintiffs' motion to compel answers to deposition questions (Date Entered: 3/1/96) (cc: all counsel)

[4:93-cv-01644] (mh) [Entry date 03/01/96]

3/11/96 110 STIPULATION and ORDER by Judge D. L. Jensen : The City's motion for summary judgment will be heard by 10:00 4/17/96 ; (cc: all counsel) [4:93-cv-01644] (mh) [Entry date 03/12/96]

3/11/96 111 OBJECTIONS by defendant SF City and County to Magistrate's order granting plaintiff's motion to compel answers to deposition questions & motion to receive further evidence [4:93-cv-01644] (mh) [Entry date 03/14/96]

3/11/96 112 DECLARATION by James Lazarus on behalf of defendant in support of the objection [111-1] [4:93-cv-01644] (mh) [Entry date 03/14/96]

3/11/96 113 SUPPLEMENTAL DECLARATION by Ted Dienstfrey on behalf of defendant in opposition to motion to compel answers to deposition questions [4:93-cv-01644] (mh) [Entry date 03/14/96]

3/27/96 114 STIPULATION and ORDER by Judge D. L. Jensen : The City's motion for summary judgment will be heard by 10am 5/15/96 (cc: all counsel) [4:93-cv-01644] (mh) [Entry date 04/01/96]

4/25/96 115 STIPULATION and ORDER by Judge D. L. Jensen : The City's motion for

summary judgment will be heard by 10am 7/3/96 (cc: all counsel) [4:93-cv-01644] (mh) [Entry date 04/29/96]

6/7/96 116 MEMORANDUM by Plaintiffs in opposition to the motion for summary judgment [4:93-cv-01644] (mh)

6/7/96 117 DECLARATION by Paul F. Utrecht on behalf of Plaintiff in opposition to the motion for summary judgment [4:93-cv-01644] (mh)

6/7/96 118 DECLARATION by Robert Field on behalf of Plaintiffs in opposition to motion for summary judgment [4:93-cv-01644] (mh)

6/7/96 119 DECLARATION by James Whelan on behalf of Plaintiffs [4:93-cv-01644] (mh)

6/7/96 120 DECLARATION by Andrew M. Zacks on behalf of Plaintiffs in opposition to the motion for summary judgment [4:93-cv-01644] (mh)

6/7/96 121 REQUEST FOR JUDICIAL NOTICE by Plaintiffs in opposition to the motion for summary judgment [4:93-cv-01644] (mh)

6/7/96 122 PROOF OF SERVICE by Plaintiffs of #116 - #121 [4:93-cv-01644] (mh)

6/19/96 123 REPLY by defendant SF City and County to opposition to motion for summary

judgment [87-1] [4:93-cv-01644] (kk) [Entry date 06/24/96]

7/1/96 124 SUPPLEMENT by Plaintiff re declaration of Andrew M. Zacks [120-1] [4:93-cv-01644] (mh) [Entry date 07/02/96]

7/3/96 125 MINUTES: (C/R Carol Karen) that the motion for summary judgment [87-1] is submitted Hearing held [4:93-cv-01644] (mh) [Entry date 07/09/96]

8/26/96 126 ORDER by Judge D. L. Jensen granting defendant's motion for summary judgment [87-1] as to the facial takings claim; as to the pendant state law claims and counts 5 & 6 of the Complaint; The preliminary injunction issued in this action is VACATED; Plaintiffs' state law action for mandamus review is still pending, plaintiffs' request for leave to amend to add an equal protection claim is DENIED as futile at this time; The Court expresses no opinion on the merits of this claim dismissing case; appeal filing ddl 9/26/96 (Date Entered: 8/27/96) (cc: all counsel) [4:93-cv-01644] (mh) [Entry date 08/27/96]

8/26/96 127 JUDGMENT: by Judge D. L. Jensen Judgment is hereby entered in favor of defendant City & County of San Francisco & against plaintiffs The San Remo Hotel, L.P., Thomas Field, Robert Field, &

T&R Investment Corp. (Date Entered: 8/27/96) (cc: all counsel) [4:93-cv-01644] (mh) [Entry date 08/27/96]

9/12/96 128 BILL OF COSTS submitted by defendant SF City and County re judgment [127-2] [4:93-cv-01644] (mh)

9/20/96 129 NOTICE OF APPEAL by Plaintiff The San Remo Hotel, Plaintiff Thomas Field, Plaintiff Robert Field, Plaintiff T & R Investment Cor from Dist. Court decision judgment [127-2], order [126-2]; Appeal Fee status PAID [4:93-cv-01644] (mh) [Entry date 09/24/96]

9/20/96 130 TRANSCRIPT DESIGNATION and Ordering Form filed by Plaintiff for dates 3/30/94, & 7/3/96 ; C/R: Not Given; appeal [129-1] [4:93-cv-01644] (mh) [Entry date 09/24/96]

9/24/96 -- Docket fee notification form and case information sheet to USCA [129-1] [4:93-cv-01644] (mh)

9/24/96 -- Copy of notice of appeal and docket sheet to all counsel [4:93-cv-01644] (mh)

10/9/96 -- COSTS taxed for defendant SF City and County in the amount of $ 738.00 against Plaintiff The San Remo Hotel, Plaintiff Thomas Field, Plaintiff Robert Field, Plaintiff T & R Investment Cor (cc: all counsel) [4:93-cv-01644] (mh)

10/9/96	--	NOTIFICATION by Circuit Court of Appellate Docket Number 96-16843 of the Appeal file 9/20/96 [4:93-cv-01644] (mh)
10/21/96	131	REPORTER'S TRANSCRIPT; Date of proceedings: 3/30/94 (C/R: Candace L. Yount) [4:93-cv-01644] (mh)
10/21/96	132	REPORTER'S TRANSCRIPT; Date of proceedings: 7/3/96 (C/R: Carol Al Karen) [4:93-cv-01644] (mh)
10/25/96	--	CERTIFICATE of Record mailed to USCA, counsel notified. [4:93-cv-01644] (mh)
10/16/97	--	RECORD on Appeal to USCA, cnsl notified. re appeal [129-1] [4:93-cv-01644] (scu)
10/21/97	133	RECEIPT from USCA of clerk's record on appeal [4:93-cv-01644] (mh) [Entry date 10/22/97]
6/25/98	134	RECEIPT from USCA of clerk's record on appeal [4:93-cv-01644] (mh)
8/14/98	135	CERTIFIED COPY of USCA Mandate Order: affirming in part, reversing in part, remanding in part the decision of the District Court [Appeal [129-1] [4:93-cv-01644] (mh) [Entry date 08/17/98]

8/17/98	136	CLERK's letter spreading the mandate to counsel. re appeal [129-1] [4:93-cv-01644] (mh)
8/24/98	137	CLERK'S NOTICE Status conference set for 8:30am on 9/30/98; Status Conference Statement is due 9/21/98 [4:93-cv-01644] (mh) [Entry date 08/25/98]
9/22/98	138	JOINT STATUS CONFERENCE STATEMENT by Plaintiffs [4:93-cv-01644] (mh) [Edit date 09/22/98]
9/30/98	139	MINUTES: (C/R Not Reported) Status conference held & continued for 9:30am on 10/13/99 [4:93-cv-01644] (mh) [Entry date 10/02/98]
10/8/98	140	ORDER by Judge D. L. Jensen Pursuant to the Ninth Circuit's mandate, the Court hereby VACATES the judgment issued pursuant to this Court's 8/26/96 Order & ORDERS the dismissal of Plaintiffs' as-applied takings claim as unripe; Denying Plaintiffs' leave to amend to state an equal protection claim [SEE DOCUMENT FOR DETAILS] (Date Entered:1009/98) (cc: all counsel) [4:93-cv-01644] (mh) [Entry date 10/09/98]
2/10/99	141	NOTICE by defendant SF City and County of change of address of attorney [4:93-cv-01644] (rl) [Entry date 02/11/99]

10/13/99	142	MINUTES: (C/R Not Reported) (Hearing Date: October 13, 1999) Status conference, via telephone, held. Case in state Court of Appeals with briefing schedule set. Hearing in summer at Court of Appeals (estimated date). Further status conference, via telephone, is set for 1:30 p.m. on 5/26/00. [4:93-cv-01644] (rl) [Entry date 10/14/99]
10/13/99	143	CLERK'S NOTICE Status conference, via telephone, is set for 1:30 p.m. on 5/26/00. [4:93-cv-01644] (rl) [Entry date 10/14/99]
2/4/00	144	NOTICE by Plaintiff The San Remo Hotel, Plaintiff Thomas Field, Plaintiff Robert Field, Plaintiff T & R Investment Cor of change of suite number [4:93-cv-01644] (rl)
5/26/00	145	MINUTES: (C/R Not Reported) (Hearing Date: 5/26/00) Further Status conference set for 1:30pm on 10/27/00; [4:93-cv-01644] (oh) [Entry date 05/30/00]
10/27/00	146	MINUTES: (C/R not reported) (Hearing Date: 10/27/00) Further Status conference telephone [4:93-cv-01644] (kk) [Entry date 10/30/00]
2/9/01	147	MINUTES: (C/R Not Reported) (Hearing Date: 2/9/01) Telephonic status conference not held. Telephonic Status conference continued to 2/16/01 . [4:93-cv-01644] (rl) [Entry date 02/13/01]

2/16/01	148	MINUTES: (C/R not reported) (Hearing Date: 2/16/01) Hearing not held, defense attorney unavailable [4:93-cv-01644] (kk) [Entry date 02/20/01]
2/20/01	149	CLERK'S NOTICE Telephonic status conference is set for 1:30 p.m. on 4/13/01. [4:93-cv-01644] (rl) [Entry date 02/22/01]
4/9/01	150	JOINT STATUS CONFERENCE STATEMENT by Plaintiffs [4:93-cv-01644] (rl) [Entry date 04/10/01]
4/10/01	151	CLERK'S NOTICE Telephonic status conference is continued from 4/13/01 to 1:30 p.m. on 1/11/02. [4:93-cv-01644] (rl)
1/7/02	152	STATUS CONFERENCE STATEMENT by Plaintiffs [4:93-cv-01644] (kc) [Entry date 01/08/02]
1/8/02	153	STATUS CONFERENCE STATEMENT by defendant SF City and County [4:93-cv-01644] (kc) [Entry date 01/10/02]
1/9/02	154	CLERK'S NOTICE Status conference 1:30 by telephone [4:93-cv-01644] (kc) [Entry date 01/10/02]
1/11/02	155	MINUTES: (C/R not reported) Status conference reschedule to 1:30 on 3/29/02 [4:93-cv-01644] (kc)

3/22/02	156	STATUS CONFERENCE STATEMENT by defendant SF City and County [4:93-cv-01644] (kc)
3/29/02	157	MINUTES: (C/R not reported) (Hearing Date: 3/29/02) status hearing not held [4:93-cv-01644] (kc) [Entry date 04/03/02]
4/3/02	158	CLERK'S NOTICE Status conference by telephone set for 1:30 on 5/10/02 [4:93-cv-01644] (kc) [Entry date 04/04/02]
5/8/02	159	STATUS REPORT by Plaintiffs [4:93-cv-01644] (kk) [Entry date 05/09/02]
5/10/02	160	MINUTES: (C/R not reported) (Hearing Date re: status held on May 10, 2002) Plaintiff to file amended complaint by June 4, 2002 [4:93-cv-01644] (kk) [Entry date 05/13/02]
6/13/02	161	AMENDED COMPLAINT [58-1] by Plaintiff [4:93-cv-01644] (kk) [Entry date 06/14/02]
6/27/02	162	NOTICE OF MOTION AND MOTION before Judge D. L. Jensen by defendant SF City and County to dismiss amended complaint with Notice set for 8/2/02 at 2:00 [4:93-cv-01644] (kc)
6/27/02	163	MEMORANDUM by defendant SF City motion to dismiss amended complaint (kc)

6/27/02	164	REQUEST FOR JUDICIAL NOTICE by defendant SF City and County motion to dismiss amended complaint [162-1] [4:93-cv-01644] (kc)
6/27/02	--	RECEIVED Proposed Order (defendant SF City and County) re: motion to dismiss amended complaint [162-1] [4:93-cv-01644] (kc)
7/3/02	165	PROOF OF SERVICE by defendant of order received [0-0], request [164-1], memorandum [163-1], motion to dismiss amended complaint [162-1] [4:93-cv-01644] (oh) [Entry date 07/05/02]
7/15/02	166	STIPULATION and ORDER by Judge D. L. Jensen: continuing hearing on motion to dismiss amended complaint [162-1] to 2:00 on 9/6/02; opposition to be filed by 7/26/02; reply due 8/9/02; (cc: all counsel) [4:93-cv-01644] (kc) [Entry date 07/16/02]
7/29/02	167	MEMORANDUM by Plaintiff in opposition to motion to dismiss amended complaint [162-1] [4:93-cv-01644] (kk)
7/29/02	168	EXHIBIT A re opposition memorandum [167-1] [4:93-cv-01644] (kk)
7/31/02	--	RECEIVED stipulation and proposed order extending filing deadline for opposition to dismiss submitted by Plaintiffs [4:93-cv-01644] (kc)

7/31/02	169	STIPULATION and ORDER by Judge D. L. Jensen : extending filing deadline for opposition to motion to dismiss to 7/29/02 (cc: all counsel) [4:93-cv-01644] (kk) [Entry date 08/01/02]
8/9/02	170	REPLY memorandum by defendant SF City and County in support of motion to [4:93-cv-01644] (pta) [Entry date 08/12/02]
8/19/02	171	APPLICATION before Judge D. L. Jensen by Pacific Legal Foundation for leave to appear as amicus curiae [4:93-cv-01644] (kc)
8/19/02	--	RECEIVED brief in opposition to motion to dismiss amended complaint by Pacific Legal Foundation [4:93-cv-01644] (kc)
8/19/02	172	PROOF OF SERVICE by Pacific Legal leave to appear as amicus curiae [171-1]; brief in opposition [4:93-cv-01644] (kc)
8/22/02	173	LETTER to Judge Jensen, dated 8/19/02, from Andrew W. Schwartz regarding copy of recent opinion of the Ca. Court of Appeal [4:93-cv-01644] (kc) [Entry date 08/26/02]
9/3/02	174	ORDER by Judge D. L. Jensen Legal Foundation for leave to appear as amicus curiae [171-1] (Date Entered: 9/3/02) (cc: all counsel) [4:93-cv-01644] (kc)

9/3/02	175	Brief in OPPOSITION by Amicus Curiae Pacific Legal Found to motion to dismiss amended complaint [162-1] [4:93-cv-01644] (kc)
9/5/02	176	REPLY by defendant SF City and County re opposition [175-1] [4:93-cv-01644] (oh) [Entry date 09/09/02]
9/6/02	177	MINUTES: (C/R Raynee Mercado) (Hearing Date: 9/6/02) motion to dismiss amended complaint [162-1] held and under submission; Court to prepare order [4:93-cv-01644] (kc) [Entry date 09/10/02]
10/15/02	178	ORDER by Judge D. L. Jensen granting motion to dismiss amended complaint [162-1] Plaintiff granted leave to amend within 30 days of the date of this order (Date Entered: 10/16/02) (cc: all counsel) [4:93-cv-01644] (kk) [Entry date 10/16/02]
11/14/02	179	THIRD AMENDED COMPLAINT by Plaintiff The San Remo Hotel, Plaintiff Thomas Field, Plaintiff Robert Field, Plaintiff T & R Investment Cor [4:93-cv-01644] (kk) [Entry date 11/15/02]
12/9/02	180	SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE by defendant SF

		City and County in support of motion to dismiss amended complaint [181] [4:93-cv-01644] (oh) [Entry date 12/10/02] [Edit date 01/15/03]
12/9/02	181	NOTICE OF MOTION AND MOTION WITH MEMORANDUM OF POINTS AND AUTHORITIES before Judge D. L. Jensen by defendant SF City and County to dismiss third amended complaint with Notice set for 1/24/03 at 2:00pm [4:93-cv-01644] (kk) [Entry date 01/15/03]
12/30/02	182	NOTICE by Plaintiff of attorney's change of address [4:93-cv-01644] (kc)
12/31/02	--	RECEIVED stipulation & order continuing motion to dismiss hearing date submitted by Plaintiff [4:93-cv-01644] (kk) [Entry date 01/02/03]
1/15/03	183	STIPULATION and ORDER by Judge D. L. Jensen : setting hearing on motion to dismiss third amended complaint [181-1] at 2:00pm on 3/7/03; opposition due 1/17/03; reply due 2/7/03(cc: all counsel) [4:93-cv-01644] (kk)
1/17/03	184	MEMORANDUM by Plaintiff in opposition to motion to dismiss third amended complaint [181-1]

		[4:93-cv-01644] (kk) [Entry date 01/21/03]
1/17/03	185	REQUEST FOR JUDICIAL NOTICE by Plaintiff opposition memorandum [184-1] [4:93-cv-01644] (kk) [Entry date 01/21/03]
2/7/03	186	REPLY by defendant SF City and County re motion to dismiss third amended complaint [181-1] [4:93-cv-01644] (oh) [Entry date 02/10/03]
2/24/03	187	STIPULATION and ORDER by Judge D. L. Jensen : setting hearing on motion to dismiss third amended complaint [181-1] 2:00 3/21/03 (cc: all counsel) [4:93-cv-01644] (kk) [Entry date 02/25/03]
3/21/03	188	MINUTES: (C/R Raynee Mercado) (Hearing Date: 3/21/03) that the motion to dismiss third amended complaint [181-1] is submitted [4:93-cv-01644] (kk) [Entry date 03/24/03]
3/25/03	189	LETTER dated 3/24/03 from Paul F. Utrecht re: response to question posed at 3/21/03 hearing [4:93-cv-01644] (kk) [Entry date 03/26/03]

3/31/03	190	LETTER dated 3/27/03 from Andrew W. Schwartz re: San Remo claim [4:93-cv-01644] (kk) [Entry date 04/02/03]
4/16/03	191	ORDER by Judge D. L. Jensen granting motion to dismiss third amended complaint [181-1] dismissing case; appeal filing ddl 5/17/03 (Date Entered: 4/17/03) (cc: all counsel) [4:93-cv-01644] (kk) [Entry date 04/17/03]
4/28/03	192	JUDGMENT entered in favor of defendants City & County of San Francisco and against plaintiffs San Remo Hotel, Thomas Field, Robert Field and T&R Investment Corp. pursuant to court order 4/16/03 by Judge D. L. Jensen (Date Entered: 4/30/03) (cc: all counsel) [4:93-cv-01644] (kk) [Entry date 04/30/03]
5/1/03	193	NOTICE by defendant SF City and County [192-1] judgment [4:93-cv-01644] (kk) [Entry date 05/02/03]
5/6/03	194	NOTICE OF APPEAL by Plaintiff The San Remo Hotel, Plaintiff Thomas Field, Plaintiff Robert Field, Plaintiff T & R Investment Cor from Dist. Court decision judgment [192-1] Fee status paid [4:93-cv-01644] (oh)

5/6/03	--	Docket fee notification form and case information sheet to USCA [194-1] [4:93-cv-01644] (oh)
5/6/03	--	Copy of notice of appeal and docket sheet to all counsel [4:93-cv-01644] (oh)
6/2/03	195	TRANSCRIPT DESIGNATION and Ordering Form filed by Plaintiffs for dates 9/6/02, 3/21/03; C/R: Raynee Mercado; appeal [194-1] [4:93-cv-01644] (kc)
7/7/03	196	REPORTER'S TRANSCRIPT; Date of proceedings: 9/6/02 (C/R: Raynee Mercado) minutes [177-1] [4:93-cv-01644] (kc) [Entry date 07/08/03]
7/7/03	197	REPORTER'S TRANSCRIPT; Date of proceedings: 3/21/03 (C/R: Raynee Mercado) minutes [188-1] [4:93-cv-01644] (kc) [Entry date 07/08/03]
7/8/03	--	CERTIFICATE of Record mailed to USCA, counsel notified. [4:93-cv-01644] (kc)
6/21/04	198	COPY of judgment from USCA affirming the decision of the District Court [194-1] [4:93-cv-01644] (fw) [Entry date 06/22/04]

6/22/04	199	CLERK's letter spreading the mandate to counsel. re appeal [194-1] [4:93-cv-01644] (fw)

United States Court of Appeals
for the Ninth Circuit
96-16843

10/3/96	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. setting schedule as follows: CADS is past due; CADS must be filed no later than 10/10/96; appellant's designation of RT is due 9/30/96; appellee's designation of RT is due 10/10/96; appellant shall order transcript by 10/21/96; court reporter shall file transcript in DC by 11/20/96; certificate of record shall be filed by 11/27/96; appellant's opening brief is due 1/6/97; appellees' brief is due 2/5/97; appellants' reply brief is due 2/19/97. [96-16843] (tm)
10/3/96	Filed notice of representation of Paul F. Utrecht, Esq. for aplts. [96-16843] (dg)
10/3/96	Filed attorney for Appellant Civil Appeals Docketing Statement served on 10/2/96 (to CONFATT) [96-16843] [96-16843] (dg)
10/16/96	Filed Candace Yount's notice of order of transcript. RT ordered 10/4/96; Expected payment date: 10/7/96; Number of pages:; Expected completion: [96-16843] (dg)
10/28/96	Filed certificate of record on appeal RT filed in DC 10/21/96 [96-16843] (dg)
11/18/96	Case released from Pre-Briefing Conference program. (ah)

12/30/96	7 day oral extension by phone of time to file The San Remo Hotel brief. [96-16843] appellants' brief due 1/13/97; appellees' brief due 2/12/97,, ; optional reply brief due 14 days from service of answering brief (cb)
1/13/97	Filed original and 15 copies Aplts' opening brief (Informal: n) 43 pages & 5 Exc. Rec.; served on 1/13/97 [96-16843] (gva)
2/12/97	Filed original and 15 copies appellee S.F. City and County, Dept. City Planning, City Planning Comm., Board of Permit, Board of Supervisors's 35 pages brief, ; served on 2/12/97 [96-16843] (ajk)
2/24/97	14 day oral extension by phone of time to file 's reply brief. [96-16843] appellants' reply brief due 3/12/97; (king)
3/12/97	Filed original and 15 copies The San Remo Hotel, Thomas Field, Robert Field, T&R Investment Corp. reply brief, (Informal: no) 23 pages; served on 3/12/97 [96-16843] (ajk)
3/14/97	Copy of letter received from Paul Utrecht dated 2/25/97 re: ex..tm.f aplt's rpy br. Brief due 3/12/97 (Casefiles) [96-16843] (gva)
6/24/97	Calendar check performed [96-16843] (aw)
8/25/97	Calendar materials being prepared. [96-16843] [96-16843] (mw)

8/28/97	CALENDARED: SAN FRAN Nov 4 1997 9:00 am Courtroom 1[96-16843] (aw)
10/27/97	Received Aples' additional citations, served on 10/27/97 (fed.ex to Panel) [96-16843] (gva)
11/4/97	ARGUED AND SUBMITTED TO Harlington Wood, Pamela A. RYMER, A. W. TASHIMA [96-16843] (ah)
6/3/98	FILED OPINION: We affirm the d.c's dismissal of Field's as applied takings claim, the denial of leave to amend the complaint to state an equal protection claim, and the dismissal of the Permit Streamlining Act claim. We reverse the d.c's dismissal of Field's facial takings claim and remand with instructions to abstain under Pullman. Each side shall bear its own costs on appeal. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Harlington Wood; A. RYMER; A. W. TASHIMA, author) FILED AND ENTERED JUDGMENT.[96-16843] (gva)
6/17/98	[3473288] Filed original and 3 copies Aple S.F. City and County of San Franciso; 10 pages; served on 6/17/98 (Panel) [96-16843] (gva)

8/3/98	Filed order (Harlington Wood, Pamela A. RYMER, A. W. TASHIMA): Defendants-appellees' petition for rehearing is denied. [3473288-1] [96-16843] (gva)
8/11/98	MANDATE ISSUED [96-16843] (sm)
6/22/00	RECORD RETURNED. (See control card for details.) (jk)

The United States Court of Appeals
for the Ninth Circuit
03-15853

5/9/03	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): YES. setting schedule as follows: CADS is past due; CADS must be filed no later than 5/16/03; appellant's designation of RT is due 5/16/03,, ; appellee's designation of RT is due 5/27/03; appellant shall order transcript by 6/5/03; court reporter shall file transcript in DC by 7/7/03; certificate of record shall be filed by 7/14/03 ; appellant's opening brief is due 8/22/03; appellees' brief is due 9/22/03; appellants' reply brief is due 10/6/03. [03-15853] (mhf)
5/9/03	Receive notice of representation of Paul Utrecht as csl for aplts; served on 5/7/03 (Casefile) [03-15853] (gva)
5/9/03	Filed Paul F. Utrecht for Aplts Civil Appeals Docketing Statement served on 5/7/03 (to CONFATT) [03-15853] [03-15853] (gva)
5/9/03	Prior case 96-16843 Aff/Rv/Rmd Opinion 6/3/98 hw PAR AWT ** TO ANY PANEL PER AWT ** [03-15853] (mw)
6/3/03	Case rejected from Circuit Mediation Program. (sa)
7/9/03	Filed certificate of record on appeal RT filed in DC 7/8/03 [03-15853] (gva)

8/19/03	14 day oral extension by phone of time to file Appellant brief. [03-15853] appellants' brief due 9/5/03; appellees' brief due 10/6/03; the optional reply brief is due 14 days from service of the answering brief. (cg)
9/5/03	Filed original and 15 copies Appellants opening brief (Informal: NO) 56 pages and five excerpts of record in 1volumes; served on 9/5/03 [03-15853] (mhf)
9/12/03	Received Pacific Legal Foundation's amicus curiae brief in original and 15 copies of 24 pages; served on 9/11/03 in support of aplts reversal of judgment; deficient: (mtn to becm am is req). Notified csl. (gva)
9/12/03	Filed original and 15 copies Pacific Legal Found.'s amicus curiae brief of 24 pages; served on 9/11/03 (Parties consent on 1st page of br) [03-15853] (mhf)
9/23/03	Filed motion and deputy clerk order PROMO:(Deputy Clerk: lbb) The City of San Francisco's unopposed motion for an ext of time to file the answering brief is GRANTED. [4851214-1] The answering brief is due 11/5/03. The optional reply brief is due 14 days after service of the ans brf. (Motion recvd 9/9/03) [03-15853] (hh)

11/5/03	Filed original & 15 copies Aple SF City and County brief, 51 pages, 5 Supplemental Excs w/red covers; served on 11/5/03 minor defcy: (5 white covers for excs are req). Notified csl. (gva)
11/14/03	Filed original & 15 copies California State Association of Counties, League of California Cities and International Municipal Lawyers Association's amicus curiae brief of 31 pages in support of aples [all parties consent on page 2]; served on 11/12/03. [03-15853] (gva)
11/17/03	Filed motion of Appellant and deputy clerk order: (Deputy Clerk: lbs) Appellants' motion for an extension of time to file the optional reply brief is granted. The optional reply brief is due December 19, 2003. (Motion recvd 11/12/03) [03-15853] (ru)
11/17/03	Received Appellee SF City and County satisfaction of (minor) brief deficiency: (white covers for excs) (Records) [03-15853] (gva)
12/18/03	Calendar check performed [03-15853] (mw)
12/19/03	Filed original and 15 copies appellants San Remo Hotel L.P., Thomas Field, Robert Field, T&R Investment Corp. reply brief, (Informal: No) 27 pages; served on 12/19/03 [03-15853] (ru)
1/5/04	Calendar materials being prepared. [03-15853] [03-15853] (mw)

1/9/04 CALENDARED: SAN FRAN Mar 10 2004 900 am Courtroom 3 ** moved to Mon Mar 8 2004 900 am ** [03-15853] (aw)

3/2/04 Filed order (Ferdinand F. FERNANDEZ, Michael D. HAWKINS, Sidney R. THOMAS): On the Court's own motion, oral argument is moved from Wednesday, 3/10/04, ot Mondat, 3/8/04, in SF CA. (phoned/faxed) [03-15853] (gva)

3/8/04 ARGUED AND SUBMITTED TO Ferdinand F. FERNANDEZ, Michael D. HAWKINS, Sidney R. THOMAS [03-15853] (kkw)

4/14/04 FILED OPINION: AFFIRMED. (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Ferdinand F. FERNANDEZ; Michael D. HAWKINS, author; R. THOMAS) FILED AND ENTERED JUDGMENT. [03-15853] (gva)

4/15/04 Rec'd notice of change of address from R. S. Radford for Amicus Pacific Legal Found., Amicus Pacific Legal Found. dated 4/14/04. 3900 Lennane Drive Suite 200, Sacramento, CA 95834 (Casefile) [03-15853] (gva)

4/21/04 Filed motion & clerk order (Deputy Clerk: gva) Granting aplts' mtn to extend time in which to file a petition for rehearing en banc to and including 5/5/04. (mtn rcvd 4/21/04) [5040376-1] [03-15853] (gva)

4/21/04 Rec'd notice of amended change of address from R. S. Radford for Amicus Pacific Legal Found., served on 4/20/04 [same as previous ntc of chg. of add] (Casefile) [03-15853] (gva)

4/22/04 Received letter dated 4/21/04 from Andrew Schwartz for City and County of San Francisco re: ... to correct error in the opinion (Panel) [03-15853] (gva)

4/28/04 Filed Aplts San Remo Hotel L.P., Thomas Field, Robert Field, T&R Investment Corp.'s motion to strike and for sanctions; served on 4/28/04 (Panel) [03-15853] served on [5049229] [03-15853] (gva)

4/29/04 Filed Appellee SF City and County response opposing appellant's motion sanction attorney [5049229-1] served on 4/29/04 (PANEL) [03-15853] (mhf)

5/5/04 [5053966] Filed original & 50 copies Aplts' petition for panel rehearing and petition for rehearing en banc of 17 pages [4154 words]; served on 5/5/04 (PANEL AND ALL ACTIVE JUDGES) [03-15853] (gva)

5/6/04 Received Aplts' supplemental proof of service (Casefile) [03-15853] (gva)

5/7/04 Filed order (Ferdinand F. FERNANDEZ, Michael D. HAWKINS, Sidney R. THOMAS): The panel remains satisfied with its April 14, 2004 opinion, including quotations from this ct's earlier opinion and

therefore will do nothing in response to Def/Aple San Francisco's letter of April 21, 2004. Pla/Aplt San Remo Hotel's motion to strike and for sanctions is denied as moot. [5049229-1] [03-15853] (gva)

5/12/04 Received Pacific Legal Foundation's amicus curiae brief in original & 50 copies of 6 pages; in support of aplts' petition for rehearing en banc; deficient: (mtn to becm am pending); served on 5/11/04 (Panel) [03-15853] (gva)

5/12/04 Filed Pacific Legal Foundation's motion for leave to brief amicus curiae in support of aplts' petition for rehearing en banc; served on 5/11/04 (Panel) [5062535] (gva)

6/9/04 Filed order (Ferdinand F. FERNANDEZ, Sidney R. THOMAS) The application of Pacific Legal Foundation for leave to fiel brief amicus curiae in support of rehearing en banc is granted. The br is ordered filed. ... The petition for rehearing en banc is DENIED. [5062535-1] [5053966-1] [03-15853] (gva)

6/9/04 Filed original & 50 copies Pacific Legal Foundation amicus curiae brief of 6 pages; in support of aplts' petition for rehearing en banc; served on 5/11/04 (Panel And All Active Judges) [03-15853] (gva)

6/17/04 MANDATE ISSUED [03-15853] (gva)

9/17/04 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 04-340 filed on 9/7/04. (Panel) [03-15853] (gva)

12/15/04 Received letter from the Supreme Court dated 12/10/04 re: The petition for writ of certiorari is granted limited to Question 1 presented by the petition for certiorari (Panel)[03-15853] (gva)

NINTH CIRCUIT COURT OF APPEALS

No. 96-16843

Northern District of California
No. C 93 1644 DLJ

[Filed January 13, 1997]

SAN REMO HOTEL L.P.,	)
THOMAS FIELD, ROBERT FIELD,	)
and T & R INVESTMENT CORP.,	)
Plaintiffs-Appellants,	)
	)
vs.	)
	)
CITY AND COUNTY OF SAN	)
FRANCISCO, a Municipal	)
Corporation, on behalf of the	)
DEPARTMENT OF CITY PLANNING,	)
BOARD OF PERMIT APPEALS,	)
DEPARTMENT OF BUILDING	)
INSPECTION and BOARD OF	)
SUPERVISORS,	)
Defendants-Appellees.	)
	)

Appeal from the Judgment of the
United States District Court
for the Northern District of California

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

STATEMENT OF JURISDICTION 1

ISSUES ON APPEAL 2

INTRODUCTION 3

STATEMENT OF THE CASE 6

A. HISTORY OF THE SAN REMO HOTEL. 6

B. HISTORY OF THE CITY'S LEGISLATIVE ACTIONS AFFECTING THE SAN REMO HOTEL. 7

1. Hotel Conversion Ordinance. 7

2. The San Remo Hotel's Historic Zoning Classification is a Tourist Hotel. 10

3. The New Zoning Ordinance. 11

C. HISTORY OF ADMINISTRATIVE PROCEEDINGS. 12

1. The City Decided that the San Remo Hotel Requires a Conditional Use Permit to Rent Rooms to Tourists. 12

2. The City Required the Field Brothers to Pay Ransom Under the Hotel Ordinance. 15

D. PROCEEDINGS IN THE DISTRICT COURT. 16

STANDARDS OF REVIEW 17

ARGUMENT 18

I. THIS COURT SHOULD ORDER ABSTENTION UNDER PULLMAN TO ALLOW THE STATE COURTS TO RESOLVE DISPUTED ISSUES OF STATE LAW. 18

II. THE FIELD BROTHERS' FACIAL TAKING CLAIM WAS EQUITABLY TOLLED BY THE ADMINISTRATIVE PROCEEDINGS. 21

A. Equitable Tolling did not Require Notice of the Nature of The Field Brothers' Second Claim in the Limitations Period. 23

B. The City Cannot Claim that The Field Brothers should have Given Earlier Notice Because Plaintiffs gave Notice when it was due Under the City's own Rules. 28

III. THE HOTEL ORDINANCE IS FACIALLY UNCONSTITUTIONAL 30

IV. THE FIELD BROTHERS' AS APPLIED TAKING CLAIM IS RIPE FOR FEDERAL COURT CONSIDERATION. 35

A. The Field Brothers may Pursue an as Applied Taking Claim as a Pendent State Law Claim. 35

B. The Field Brothers are not Required to Present their as Applied Taking Claim in State Court Because California's Procedures did not Provide an Adequate Remedy. 36

V. THE DISTRICT COURT SHOULD HAVE GRANTED LEAVE TO PLEAD AN EQUAL PROTECTION CLAIM. 38

A. The City's Refusal to Recognize the San Remo Hotel's Legal Non-Conforming Use Status Was Arbitrary and Capricious. 39

B. The Availability of State Court Administrative Mandamus Does Not Preclude a Section 1983 Action in Federal Court. 40

ATTORNEY'S FEES 42

CONCLUSION 42

* * *

[p.2]

ISSUES ON APPEAL

1. Should this Court order Pullman abstention until the state court proceedings regarding the San Remo Hotel are completed?

2. Did the Field brothers' pursuit of administrative relief equitably toll the statute of limitations on the claim that the Hotel Ordinance is facially unconstitutional.

3. Is the Hotel Ordinance facially unconstitutional because it singles out a few hotel owners, like the Field brothers, to bear the cost of remedying San Francisco's homeless problem?

4. Did the state courts provide an adequate forum in 1993 to obtain compensation for the City's taking of the Field brothers' property?

5. Should a state administrative proceeding that is subject to pending review proceedings in state court be given preclusive effect?

* * *

[p.18]

STANDARDS OF REVIEW

1. Pullman abstention.

The standard of review for should be de novo because it is an issue that can be raised for the first time on appeal. Richardson v. Koshiba, 693 F.2d 911, 915 (9th Cir. 1982); but see Kollsman v. Los Angeles, 737 F.2d 830 (9th Cir. 1984), cert. denied, 469 U.S. 1211 (1985) (applying abuse of discretion standard).

2. Equitable tolling of the statute of limitations;

3. Facial unconstitutionality of the Hotel Ordinance; and

4. Ripeness of the as applied taking claim.

The standard of review for the above issues is de novo because they were raised by a motion for summary judgment. United States v. Williams, 994 F.2d 646 (9th Cir. 1993).

5. Administrative res judicata.

The District Court denied a request for leave to amend the complaint, which is ordinarily subject to a "strict" abuse of discretion standard. United States v. Pend Oreille Pub. Util. Dist. No. 1, 926 F.2d 1502, 1511-1512 (9th Cir. 1991). But, in this case, the denial was based on the Court's legal conclusion about the preclusive effect of the Board's decision, which is subject to de novo review. In re Russell, 76 F.3d 242, 244 (9th Cir. 1996) (res judicata and collateral estoppel reviewed de novo).

[p.19]

ARGUMENT

I. THIS COURT SHOULD ORDER ABSTENTION UNDER PULLMAN TO ALLOW THE STATE COURTS TO RESOLVE DISPUTED ISSUES OF STATE LAW.

In the District Court, the City requested abstention under Colorado River. The District Court properly rejected abstention on that ground. ER 81; CR 34 at 16. In support of its motion for summary judgment, the City again argued for abstention, based on American National Fire Ins. Co. v. Hungerford, 53 F.3d 1012, 1017 (9th Cir. 1995). In response, the Field brothers argued that if any abstention was appropriate, it should be under Pullman. CR 116 at 23.

While the issue of Pullman abstention was not fully briefed in this action, it was briefed and decided by the District Court in a related case. ER 121. Moreover, Pullman abstention concerns the relationship between state and federal courts; therefore, it can even be raised at oral argument on appeal. Richardson v. Koshiba, 693 F.2d 911, 915, 917 (9th Cir. 1982).

In Pullman, the Texas Railroad Commission issued a regulation requiring that all sleeping cars be in the charge of a Pullman conductor -- all of whom were white -- and not in the charge of a Pullman porter -- all of whom were black. The plaintiffs challenged that regulation on the grounds that it exceeded the Railroad Commission's power under state laws and it [p.20] violated the United States Constitution. The Railroad Commission claimed the regulation was authorized by a state law, but that law was unclear. The Supreme Court

held that the district court should have stayed the federal case until the state courts had decided the unclear state law issue. Railroad Commission of Texas v. Pullman Company, 312 U.S. 496, 501 (1941). The reason for that decision was that if the plaintiffs won on the state law issue, the federal courts could avoid adjudicating the constitutional issue. Pullman, supra, 312 U.S. at 498.

The Ninth Circuit precedents are virtually unanimous in finding that Pullman abstention is required in land use cases.[3] Sinclair Oil Co. v. Santa Barbara, 96 F.3d 401, 409-410 (1996) (abstention ordered for ripe takings claim); Pearl Investment Co. v. San Francisco, 774 F.2d 1460 (9th Cir. 1985), cert. denied, 476 U.S. 1170 (1986); Kollsman v. Los Angeles, 737 F.2d 830 (9th Cir. 1984), cert. denied, 469 U.S. 1211 (1985); Santa Fe Land Improvement Co. v. Chula Vista, 596 F.2d 838 (1979) (reversing dismissal order and holding that stay proper course when abstaining); Isthmus Landowners Ass'n v. California, 601 F.2d 1087 (1979) (reversing dismissal order and remanding with directions abstain under Pullman by staying the federal action pending adjudication of state issues in state court); Sederquist [p.21]v. Tiburon, 590 F.2d 278 (1978); Newport Investments, Inc. v. Laguna Beach, 564 F.2d 893 (1977); Rancho Palos Verdes Corp. v. Laguna Beach, 547 F.2d 1092 (1976).

The Ninth Circuit applies a three pronged test to determine whether Pullman abstention is appropriate:

---

[3] One exception is Shamrock Development Co. v. Concord, 656 F.2d 1380 (9 Cir. 1981), which was distinguished by Kollsman, 737 F.2d at 837 n. 19. Kollsman also distinguishes Midkiff v. Tom, 702 F.2d 788 (9 Cir. 1983), reversed on other grounds sub nom. Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

> (1) the case touches on a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy, and (3) the possible determinative issue of state law is uncertain. Confederated Salish v. Simonich, 29 F.3d 1398, 1407 (9th Cir. 1994).

In this case, the first prong is satisfied because the Ninth Circuit has consistently held that land use cases touch a sensitive area of social policy. E.g., Pearl Investment, supra, 774 F.2d 1460.

The second prong is satisfied because the Field brothers asserted state law claims, including a claim under the Permit Streamlining Act, as well as federal claims under the Constitution and 42 U.S.C. § 1983. ER 82-107; CR 58. If the Field brothers prevail on the state law claims, that will establish their right to operate a tourist hotel -- obviating the need to adjudicate their claim that they have a federal constitutional right to operate a tourist hotel. See Kollsman, 737 F.2d at 833-834 (abstention required when state law claims

* * *

NINTH CIRCUIT COURT OF APPEALS

No. 96-16843

Northern District of California
No. C 93 1644 DLJ

[Filed March 12, 1997]

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, and T & R INVESTMENT CORP., Plaintiffs-Appellants,	)
vs.	)
CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, on behalf of the DEPARTMENT OF CITY PLANNING, BOARD OF PERMIT APPEALS, DEPARTMENT OF BUILDING INSPECTION and BOARD OF SUPERVISORS, Defendants-Appellees.	)

Appeal from the Judgment of the
United States District Court
for the Northern District of California

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

INTRODUCTION 1

I. THE CITY MISREPRESENTED THE FACTS OF THIS CASE 2

II. PULLMAN ABSTENTION IS DESIGNED TO AVOID UNNECESSARY ADJUDICATION OF FEDERAL CONSTITUTIONAL ISSUES 4

A. PULLMAN ABSTENTION SHOULD BE CONSIDERED BY THIS COURT 6

B. PULLMAN ABSTENTION IS PROPER IN THIS CASE BECAUSE THE STATE COURT LITIGATION COULD MOOT THE FEDERALCLAIMS 8

III. THE STATUTE OF LIMITATIONS WAS EQUITABLY TOLLED 11

A. EQUITABLE TOLLING APPLIES WHEN PLAINTIFFS PURSUE "INTERRELATED" ADMINISTRATIVE PROCEEDINGS BEFORE FILING SUIT 11

B. THE STATUTE OF LIMITATIONS DID NOT ACCRUE IN 1979 15

IV. THERE IS NO NEED FOR REMAND BECAUSE THE FACIAL CONSTITUTIONALITY ISSUE WAS FULLY CONSIDERED IN A PRIOR DISTRICT COURT OPINION 16

V. THE FIELD BROTHERS' AS-APPLIED TAKINGS CLAIM IS RIPE 17

A. THE DISTRICT COURT CORRECTLY DECIDED THAT THE CITY HAS MADE AN AUTHORITATIVE DETERMINATION . 17

B. THE DISTRICT COURT ERRED IN FINDING THAT THE STATE COURT REMEDIES WERE ADEQUATE 18

C. THE CITY WOULD PREVENT ALL TAKINGS CLAIMS FROM BEING PRESENTED IN A FEDERAL FORUM 19

VI. THE FIELD BROTHERS CAN STATE AN EQUAL PROTECTION CLAIM 20

A. THE CITY CONFUSES COMITY AND RES JUDICATA 21

CONCLUSION 23

[p.1]

Plaintiffs and appellants San Remo Hotel, L.P., T & R Investment Corp., Thomas Field and Robert Field (all appellants are referred to as the "Field brothers") submit this reply brief in support of their appeal.

INTRODUCTION.

This appeal primarily raises procedural issues about whether or when the Field brothers are entitled to present their claims about San Francisco's Hotel Ordinance and the City's administrative determinations about the San Remo Hotel in a federal court.

The Field brothers want the federal courts to rule on the substantive merits of their claims: Is the Hotel Ordinance constitutional? Did the City deprive the Field brothers of their property in violation of the takings clause and the equal protection clause?

The Field brothers recognize that federalism concerns may require the federal courts to abstain under Railroad Commission of Texas v. Pullman Company, 312 U.S. 496 (1941), but a federal court should eventually pass on the constitutionality of the Hotel Ordinance and the City's actions.

The City believes that none of the Field brothers' claims should ever be adjudicated on the merits by a federal court. Instead, the City believes that all of the Field brothers' claims should not be considered by the federal courts for one procedural reason or another.

[p.2]

Why does the City not want a federal court to rule on the merits? The answer is clear: If reviewed on the merits, the Hotel Ordinance will not survive constitutional scrutiny in a federal court. Therefore, the City invokes one procedural doctrine after another in an attempt either to avoid constitutional scrutiny altogether or to force the federal constitutional claims into state court. Ultimately, the City would have this Court treat the Field brothers' federal constitutional rights to their property as a poor relative of the other rights secured by the federal constitution. See Dolan v. Tigard, 114 S.Ct. 2309, 2320 (1994).

This Court should reject the City's position and decide this appeal in a way that allows the Field brothers to have their federal claims adjudicated in a federal court.

I. THE CITY MISREPRESENTED THE FACTS OF THIS CASE.

The City's Statement of the Case includes false statements about the facts in this case -- statements that are disproven by the Supplemental Excerpts of Record ("SER") submitted by the City.

The City says that:

> On September 25, 1991, in compliance with the HCO, plaintiffs submitted an Initial Unit Usage Report to the City. SER 77-78. In the Report, plaintiffs stated that as of September 23, 1979, there were 61 residential units and 0 tourist units in the San Remo.

* * *

[p.8]

argument, the Field brothers reiterated that abstention under Pullman may be appropriate in this case. Reporter's Transcript of July 3, 1996 at 37.

The issue of abstention was clearly raised in the District Court.[4] In fact, the Field brothers raised Pullman abstention one month before the summary judgment hearing -- unlike the plaintiff in Richardson who waited until the day before the summary judgment hearing.

Even if this Court concludes that the Pullman issue was not properly raised in the District Court, the importance of Pullman abstention to the harmonious working of the federal and state court makes it an issue that both the District Court and this Court should consider sua sponte. Richardson, supra, 693 F.2d at 915; accord Belloti v. Baird, 428 U.S. 132, 143 n. 10 (1976).

B. PULLMAN ABSTENTION IS PROPER IN THIS CASE BECAUSE THE STATE COURT LITIGATION COULD MOOT THE FEDERAL CLAIMS.

The City does not dispute that the first and third prongs of the Pullman test are satisfied: (1) This case "touches on a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its [p.9] adjudication is open"; and (3) "[T]he possible determinative

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[4] Moreover, the district court appears to have believed that it adopted some form of abstention in denying leave to amend to state an equal protection claim. See, infra, at 21.

issue of state law is uncertain." Confederated Salish, supra, 29 F.3d at 1407.

The City's only argument concerns the second prong: "Constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy." Confederated Salish, supra, 29 F.3d at 1407. Essentially, the City's argument boils down to the proposition that the District Court's ruling on the federal claims was correct and, therefore, there is no need to delay adjudication of the federal claims until the state law claims are resolved.

There are two problems with the City's argument: (1) The District Court did not correctly decide the federal questions raised by this appeal (See, infra, at 11-23); and (2) The test for Pullman abstention is not whether defendant should prevail on the federal constitutional questions -- the test is whether the state law claims "could obviate the need to adjudicate the federal constitutional claims." Kollsman, supra, 737 F.2d at 833-834 (emphasis added).

The Field brothers filed a state court proceeding seeking judicial review of a decision by the San Francisco Board of Permit Appeals ("Board") that they are required to obtain a conditional use permit to rent the San Remo Hotel's rooms to tourists. The Field brothers presented undisputed evidence that the San Remo Hotel is a prior non-conforming use because it was [p.10] actually used for tourist rentals since before the Planning Code was amended. The Board's decision to reject their claim was both an equal protection violation and a violation of state law because it was wrong. If the Field brothers prevail on their state law claim, they will be entitled to operate a tourist hotel. That result in the state court would moot the issue of whether the Board's decision was a violation of equal protection.

In addition, once there was a determination that a tourist hotel was a legal use of the San Remo Hotel under the City Planning Code, then the Field brothers would be entitled to invoke the Ellis Act (California Government Code § 7060 et seq.) and the property would no longer be subject to the Hotel Ordinance. Bullock v. San Francisco, 221 Cal.App.3d 1072, 271 Cal.Rptr. 44 (1990). Alternatively, the state court may determine that the Hotel Ordinance ransom was improper under state law. Either result would moot the issue of whether the Hotel Ordinance is a facial or an as-applied taking under the Fifth Amendment to the United States Constitution.

In short, the City's argument that determination of the state law claims cannot moot the federal constitutional issues is simply wrong.

* * *

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

No. C-93-1644-DLJ

[Filed November 14, 2002]

THE SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD and T & R INVESTMENT CORP., Plaintiffs,	)
vs.	)
CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, on behalf of the DEPARTMENT OF CITY PLANNING,	)

CITY PLANNING COMMISSION,)
BOARD OF PERMIT APPEALS, and)
BOARD OF SUPERVISORS,)
Defendants.)
)

THIRD AMENDED COMPLAINT

THE PARTIES

1. Plaintiff The San Remo Hotel L.P. is a California limited partnership with its principal place of business in the City and County of San Francisco.

2. Plaintiffs Thomas Field and Robert Field are citizens of the State of California and are residents of the City and County of San Francisco.

3. Plaintiff T & R Investment Corp. is a California corporation with its principal place of business in the City and County of San Francisco.

4. Defendant City and County of San Francisco (the "City") is a California municipal corporation, acting under color of law. The City has enforced its regulatory schemes through its Department of City Planning, City Planning Commission, Board of Permit Appeals, and Board of Supervisors.

JURISDICTION

5. This action arises under the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

6. This action also seeks to redress the deprivation, under color of state law, of civil rights secured by the Fifth and Fourteenth Amendments of the United States Constitution pursuant to 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 1983.

7. This action also arises under 28 U.S.C. §§ 2201 and 2202 in that plaintiffs seek a declaration that the City's ordinances, independently and in concert with each other, facially and as applied, violate plaintiffs' constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution.

GENERAL ALLEGATIONS

8. Plaintiffs own and operate the San Remo Hotel, which is located at 2237 Mason Street in North Beach. The San Remo Hotel is subject to two overlapping regulatory schemes enacted by the City: Chapter 41 of the San Francisco Administrative Code, the Residential Hotel Unit Conversion and Demolition Ordinance (the "Hotel Ordinance"), and San Francisco Planning Code § 722 et seq., the North Beach Neighborhood Commercial Zoning Ordinance (the "Zoning Ordinance").

9. The San Remo Hotel was constructed in 1906. In 1916, the City approved an application to alter the building and convert it into a hotel and restaurant. Since at least the mid-1950s, the San Remo Hotel has been operated as a tourist hotel.

10. When plaintiffs purchased the San Remo Hotel in 1970, it was zoned C-2 Commercial and there were no restrictions on its use as a tourist hotel. In 1970, the City's Planning Code made no distinction between residential or

tourist use of hotel properties -- both were allowed in a C-2 Commercial zone.

11. When plaintiffs purchased the San Remo Hotel it was in a state of extreme disrepair. In 1973, the City recorded a condemnation notice against the property and required plaintiffs to make substantial repairs to bring the building into compliance with the codes governing commercial hotels. Plaintiffs spent more than $250,000 on the repairs and in 1976 the City issued a Certificate of Final Completion and Occupancy for a 62 room hotel. In 1977, the City issued a Permit of Occupancy authorizing the operation of a hotel with 62 guest rooms.

12. The San Remo Hotel is not designed for residential use: The guest rooms are about 100 square feet without private baths, and without any private or shared cooking facilities. Instead, the San Remo Hotel provides the normal amenities of a hotel: There is a front desk clerk. There is a restaurant. Linens are changed daily.

13. From 1916 to the present, the guest rooms in the San Remo Hotel have been rented primarily to transient and tourist guests on a commercial basis. From at least 1970 through present, the City has collected transient hotel taxes from the commercial use of the San Remo's hotel rooms. In 1987, the City conducted an audit to collect additional tourist hotel taxes from the San Remo Hotel. Each year, from 1970 through present, the City issued a hotel license, which does not distinguish between tourist/commercial and residential use, for the San Remo Hotel.

1981 HOTEL ORDINANCE

14. Before 1979, residential hotels were commonly known as transient hotels which rented rooms by the day, week, or month as commercially practicable. Thus, the rooms were rented on a daily basis during the summer tourist season and on a weekly or monthly basis during the winter when there were fewer tourists. These transient hotels, like most hotels, were located in commercial districts.

15. In 1979, the City enacted a temporary moratorium on the conversion of certain residential hotel rooms. Even after City Attorney George Agnost advised the Board that the 1981 Hotel Ordinance was unconstitutional, the Board adopted it.

16. The City did not provide notice of the temporary moratorium, the 1981 Hotel Ordinance, or any of the subsequent versions of the Hotel Ordinance to plaintiffs or any other hotel owners. The City Attorney issued formal Opinion No. 81-54 that no notice was required because the 1981 Hotel Ordinance was not a land use regulation.

17. The stated purpose of the 1981 Hotel Ordinance was to preserve hotel units for residential use by low income, disabled and homeless persons, by restricting the ability of hotel owners to convert (i.e., change the use from residential to tourist), alter, replace, or demolish their hotels.

18. The 1981 Hotel Ordinance established seasonal restrictions on the rental of regulated hotel rooms which prohibited the owner from renting vacant hotel units designated as residential to tourists during the winter months only. Most significantly, the 1981 Hotel Ordinance permitted the unrestricted tourist/commercial use of residentially

designated units during the summer (May through September). In addition, the 1981 Hotel Ordinance allowed the tourist and residential units to "float". That is, unlike a zoning regulation that allows a certain use on the ground floor and a different use on upper floors, the use of any particular room was not restricted by the Hotel Ordinance. Instead, it limited the number of rooms that may be used for tourists on any day.

19. The 1981 Hotel Ordinance restricted the use of residentially designated units during the winter months unless a hotel owner applied for a permit to convert under the law. A permit to convert could only be issued if a hotel owner paid the City ransom in the form of providing replacement housing or paying a fee equal to 40% of the cost of constructing replacement units and 100% of the cost of site acquisition. The 1981 Hotel Ordinance also imposed civil and criminal penalties for violations.

20. When the 1981 Hotel Ordinance was enacted, the City Attorney issued Opinion No. 81-54 concluding that:

> The residential hotel ordinance does not change in any way the definition or delineated boundaries of any use, height or bulk districts, or the underlying enumerated permitted uses on the property of the applicable zoning regulations.

The City Attorney also concluded that the 1981 Hotel Ordinance did not change the existing classification of hotels as "hotels", which were a commercial use under the Planning Code:

> In the case of hotels, the City Planning Code makes no distinction between the use of a hotel devoted to

> permanent residents or to tourists; the basic land use category is hotel.

RE-ZONING

21. Plaintiffs are informed and believe and therefore allege that: Notwithstanding the City's knowledge that the 1981 Hotel Ordinance was unconstitutional, the City decided to enact it. However, the City decided to further its goal of imposing unconstitutional restrictions on the use of hotels by changing the zoning regulations throughout the City so that it could continue to impose the unconstitutional restrictions even if a Court determined that the Hotel Ordinance was unconstitutional. This was accomplished through a series of interim rezonings, which were finalized after the California Legislature enacted the Ellis Act, Government Code § 7060 et seq.

22. The Ellis Act prohibits local governments from compelling property owners to remain in the residential rental business. The City recognized that the Ellis Act would preempt the Hotel Ordinance, but it also perceived a loophole in the Ellis Act: It does not preempt local zoning ordinances. Government Code § 7060.1(b). Therefore, the City amended the Planning Code to impose a new conditional use permit requirement for hotels so that it would have the ability to enforce the Hotel Ordinance by imposing discretionary conditions on those permits.

23. The City enacted 4 different interim zoning ordinances in a period of 5 years that the City contends limit plaintiffs' use of the San Remo Hotel, all without notice to plaintiffs. In 1982, the City enacted an interim RC-3 District which purported to require conditional use authorization for conversion to tourist hotel use. A 1984 interim re-zoning

ordinance entitled Interim North Beach Neighborhood Commercial Housing Conservation District conceded that the 1982 interim re-zoning was legally defective and purported to require conditional use authorization for conversion of any dwelling units or other housing. The notice sent to affected property owners of this zoning change only described possible restrictions to the conversion of dwelling units, a use the City admits does not include residentially designated hotel rooms. In 1985, without notice, the City adopted the North Beach Neighborhood Commercial Study District which purported to require conditional use authorization for conversion to tourist use. Throughout these years of repeated interim rezonings, plaintiffs continued to operate their hotel as a primarily tourist use as permitted by the 1981 Hotel Ordinance. In reliance on their commercial hotel rights, plaintiffs expended more than $200,000 for additional improvements to the property. The City continued to issue plaintiffs a hotel license each year and to collect hotel taxes from plaintiffs for their commercial/tourist rentals.

24. In 1987, the City enacted the Zoning Ordinance, which created the North Beach Neighborhood-Commercial District ("NBNCD"). The City's stated purpose was "to ensure the livability and attractiveness of North Beach." The Zoning Ordinance requires a conditional use authorization for new tourist hotels. The NBNCD classifies residential hotels based upon their use from August 22 to September 23, 1979, rather than the actual use in 1987. Planning Code § 790.47. The NBNCD does not recognize a lawful nonconforming use that arose after 1979 and before 1987, when the NBNCD was enacted.

1990 HOTEL ORDINANCE

25. On May 12, 1990, the City enacted a revised version of the Hotel Ordinance (the "1990 Hotel Ordinance"), which unconstitutionally restricted the rights of ownership and use of plaintiffs' private property in the following ways:

(a) The 1990 Hotel Ordinance no longer allowed unlimited summer tourist use of residential units, but only allowed 25% of residential units to be used for tourists during the summer. Hotel Ordinance § 41.19. And, those rooms could be rented to tourists only if those rooms were rented at least 50% of the time to permanent residents during the winter months. Hotel Ordinance § 41.19(a)(2). Those residential rentals would subject the rooms to the rent eviction controls of the San Francisco Residential Rent Stabilization and Arbitration Ordinance, effectively eliminating the possibility of using these rooms as historically permitted tourist rentals during the summer season.

(b) The 1990 Hotel Ordinance substantially increased the amount of the replacement housing fee from 100% of the cost of site acquisition plus 40% of the cost of construction of replacement units to 100% of the site cost plus 80% of the construction cost. Hotel Ordinance § 41.13(a)(4).

(c) Section 41.3(m) of the 1990 Hotel Ordinance expressly admits that its underlying purpose for nearly doubling the fee was the reduction in public funding for housing:

> Federal, state and local funds were incorrectly assumed [in 1981] to be available and sufficient to make up the shortfall between the 40% in-lieu fee and actual replacement costs. For example, in 1979 the

federal government was spending 32 billion dollars on housing and is spending only 7 billion dollars in 1989.

(d) The 1990 Hotel Ordinance fails to provide any administrative hearing procedure for relief on grounds of economic hardship, and fails to consider whether hotel owners may be precluded from obtaining a fair return on their investment if they are not allowed to use the property for commercial tourist use.

(e) The 1990 Hotel Ordinance arbitrarily mandates oppressive criminal and civil penalties for violation of its provisions.

EFFECT OF 1981 AND 1990 HOTEL ORDINANCES ON THE SAN REMO HOTEL

26. The 1981 Hotel Ordinance required the operator of each hotel in San Francisco to make a declaration specifying the number of rooms occupied by individuals who had resided in their hotel rooms for 32 days or more as of September 23, 1979. Based on that declaration, the City issued an initial unit usage report to the hotel operator certifying the number of residential and tourist units were permitted in the building. This designation occurred without regard to nor mention of the zoning regulations applicable to the property.

27. In 1981, the San Remo Hotel was operated by Jean Iribarren, who leased it from the plaintiffs. Mr. Iribarren, who did not speak English fluently, submitted a false declaration, stating that all of the rooms in the San Remo Hotel were occupied by persons who had resided in their rooms for more than 32 days. In fact, fewer than 10 of the rooms were actually occupied by persons for more than 32 days. Based on Mr. Iribarren's false declaration, the City

classified all 62 of the rooms in the San Remo Hotel as residential under the Hotel Ordinance.

28. Plaintiffs did not receive any notice that a declaration was required nor any notice that Mr. Iribarren had submitted a false declaration. The 1981 Hotel Ordinance required that any appeals be filed within 10 days after the initial unit usage report was issued by the City. Plaintiffs could not have filed an appeal because they had no notice of the false declaration nor the City's initial usage report until after the appeal deadline had expired.

29. The 1981 Hotel Ordinance had little impact on plaintiffs. Even though all of the rooms were designated residential units, the San Remo Hotel was able to operate primarily as a tourist hotel because the 1981 Hotel Ordinance allowed unlimited tourist use of residential units from May 1 to September 30.

30. The 1990 Hotel Ordinance had an enormous impact on the San Remo Hotel. Instead of having the right to keep all of the rooms vacant during the winter months so that those rooms would be available for use by tourists during the summer months, plaintiffs were required to rent the rooms to residents during the winter months, thereby subjecting them to eviction controls under Rent Control. And, even if plaintiffs succeeded that only allowed 25% of the rooms to be used for tourists.

31. While the 1990 Ordinance did allow for hotels to apply for additional tourist use, plaintiffs could not rely on that application process because the 1990 Ordinance limited that to a total of 60 rooms in the entire City, i.e., out of more than 18,000.

32. Plaintiffs could not operate their business on the assumption that the San Remo Hotel would be the only successful applicant for such rooms. Moreover, plaintiffs could not postpone their decision until after the City acted on those future applications by plaintiffs because they would have been required to pay the nearly-doubled replacement housing fee newly imposed by the 1990 Ordinance.

ADMINISTRATIVE PROCEEDINGS

33. As a consequence, in May 1990, plaintiffs filed an application with the City to convert the San Remo Hotel's residentially designated hotel rooms to tourist use under the 1990 Hotel Ordinance. The City refused to act on the application until 1997.

34. After plaintiffs filed the conversion application under the 1990 Hotel Ordinance, the Planning Department informed plaintiffs that the Zoning Ordinance defines the rooms at the San Remo Hotel as group housing units and therefore plaintiffs must obtain a conditional use permit under the Planning Code to convert to a tourist hotel. The City contended that the false declaration submitted by Mr. Iribarren under the 1981 Hotel Ordinance resulted in an abandonment of plaintiffs' commercial zoning rights.

35. In July 1990, plaintiffs filed applications for a conditional use permit and environmental review under protest. After a one year delay, the City finally issued a Final Negative Declaration stating that the continued tourist operation of plaintiffs' hotel would not have a significant effect on the environment. Thereafter, the City repeatedly and steadfastly refused to schedule a hearing on plaintiffs' application for conditional use authorization. In June 1992, plaintiffs invoked the protections of the Permit Streamlining

Act, California Government Code § 65920 et seq., which imposes strict deadlines for action by government agencies on permit applications. Throughout the City's delay in acting on the permit applications, plaintiffs continued to insist that no conditional use permit could be lawfully required in this case.

36. Finally, on August 20, 1992, in direct response to plaintiffs' invocation of the Permit Streamlining Act, the City scheduled a public hearing on plaintiffs' application for a conditional use permit. On the day of the public hearing, the City Attorney advised plaintiffs that the Planning Commission was without jurisdiction to adjudicate plaintiffs' claim that the San Remo Hotel was a lawful non-conforming or permitted conditional use as defined by the Zoning Ordinance. The City Attorney further advised plaintiffs that only the City's Board of Permit Appeals could make such a finding. Plaintiffs agreed to delay the Planning Commission hearing so that the Board of Permit Appeals could hear their claims. The City's conduct throughout the administrative proceedings was intended to prevent plaintiffs from seeking judicial relief.

37. On or about September 9, 1992, the Zoning Administrator issued a written determination that the San Remo Hotel's 62 rooms are "group housing" units and a residential hotel as defined by Planning Code § 790.47.

38. On or about September 21, 1992, plaintiffs filed a timely administrative appeal to the Board of Permit Appeals, alleging that the Zoning Administrator improperly applied the relevant Planning Code provisions. Plaintiffs also alleged that the classification of the San Remo as a residential use under the Planning Code denied plaintiffs due process of law, constituted a taking of property without just compensation, and denied plaintiffs equal protection of the laws. On or about November 12, 1992, the Zoning Administrator issued

a supplemental determination restating his classification of the San Remo as a residential use under the Planning Code.

39. In 1990, the City first claimed that the San Remo Hotel lost its historic, commercial zoning classification because the City had classified the rooms as residential units under the 1981 Hotel Ordinance. In the administrative proceedings, the Fields presented undisputed proof of ongoing, actual and lawful commercial tourist use of the San Remo Hotel since at least 1971. The fact that the San Remo Hotel was operated as a commercial, tourist hotel when the City changed the zoning in 1987 is not contradicted by the evidence in the administrative record.

40. Although the Planning Code does not distinguish between residential and tourist/commercial hotels and the Planning Code does not define group housing to include residential hotels, the City contended that by "administrative practice" residential hotels rooms are treated as group housing. The City arbitrarily and without any legal basis insisted that the tourist use actually maintained by plaintiffs, which was legal under the Hotel Ordinance, was not a prior non-conforming use because it was only allowed by "special permission" of the Zoning Administrator and since 1982 the City Planning Code has prohibited any tourist use at all by the San Remo Hotel. The City offered no documents or other evidence that this "special permission" was contemporaneously granted by the Zoning Administrator. The City did not offer evidence of actual use in 1987; instead, relying on its argument that the designation under the 1981 Hotel Ordinance determined the legal use of the San Remo Hotel. The City made that argument notwithstanding a 1981 City Attorney Opinion (No. 81-54), which concluded that the Hotel Ordinance is "not a land use regulation" and

that it does not render any existing structure or use a non-conforming structure or use.

41. On December 9, 1992, the Board of Permit Appeals agreed with the City's argument and determined that, although the 1981 Hotel Ordinance had allowed tourist use of the residential units, that use was illegal. Therefore, the Board concluded that the San Remo Hotel was not a prior nonconforming tourist use and plaintiffs were required to obtain a conditional use permit to continue renting any rooms to tourists.

42. The President of the Board of Permit Appeals stated that it could not rule on the constitutionality of the laws involved in the case, but his view was that the City has forced small hotel owners to assume the social burden of supplying affordable housing, which should be borne by every taxpayer.

43. After plaintiffs' request for rehearing was denied on January 13, 1993, the Board of Permit Appeals's decision and order became final.

44. On January 21, 1993, the Planning Commission approved plaintiffs' application for conditional use authorization on condition that plaintiffs mitigate the "loss of housing" by paying $567,000 to the City. In addition to the payment to replace the "lost housing", the Planning Commission's decision also violated plaintiffs' fundamental rights by requiring them to offer lifetime leases to the current residents of the San Remo Hotel. The Planning Commission decision also required plaintiffs to obtain variances from the floor area ratio limitations and parking requirements created by the Zoning Ordinance.

45. Plaintiffs are informed and believe and therefore allege that the City has never imposed both a condition of payment of a replacement housing fee and a requirement of lifetime leases for existing tenants on a conditional use permit for the conversion of residential hotel rooms to tourist use.

46. Plaintiffs would have invoked their right to withdraw the property from residential rental use under the Ellis Act, California Government Code § 7060 et seq., if the City had not imposed the condition requiring them to offer lifetime leases to the existing tenants.

47. The Planning Code provides for an appeal of a conditional use decision of the Planning Commission to the Board of Supervisors. To make that appeal, plaintiffs were required to (and did) obtain the signatures of thirty-five (35) of the neighboring property owners, i.e., at least 20% of the owners of land within a radius of 300 feet from the exterior limits of plaintiffs' property.

48. On April 19, 1993, the Board of Supervisors voted 6-5 to reject plaintiffs' administrative appeal and upheld the decision of the Planning Commission which imposed severe, arbitrary, and unreasonable conditions on plaintiffs' ability to retain their commercial zoning classification. One supervisor called the decision "organized extortion".

49. Because the San Remo Hotel is a lawful commercial use under zoning, the City may not lawfully impose a requirement that plaintiffs seek and justify parking and floor area ratio variances. However, on May 18, 1993, plaintiffs voluntarily filed applications for the variances under protest.

50. Under Planning Code § 306.2, the City Zoning Administrator was required to hold a public hearing within thirty days after accepting the application on May 19, 1993. The City Zoning Administrator failed to comply with this requirement and instead, intentionally delayed until August 24, 1993 when he held a duly noticed public hearing on the variance applications. Despite repeated requests by plaintiffs, the Zoning Administrator refused to act on the variance applications.

51. City Planning Code § 306.4(d)(1) further provides that if the Zoning Administrator fails to act on a variance application within 60 days from the date of conclusion of the hearing, the applicant shall be entitled "to cause the matter to be placed before the City Planning Commission for decision at its next following regular meeting." On October 25, 1993, 60 days following the duly noticed public hearing on the variance applications, plaintiffs requested in writing that the matter be immediately set for decision before the City Planning Commission as required by law. The City refused plaintiffs' request and instead the Planning Commission met in closed door executive session to discuss the San Remo matter. Under California Government Code § 65920 et seq., the variance applications must be deemed approved by operation of law, due to the City's failure to hold a timely hearing and issue a timely decision.

52. On December 11, 1996, plaintiffs paid the $567,000 fee that the City contends is due under the HCO and as a condition of plaintiffs' conditional use permit. That payment was made under protest and was tendered with a letter stating the factual and legal basis for that protest:

A. The requirement of a replacement housing fee in this case effects a taking without just compensation under the Fifth Amendment to the United States Constitution.

B. The amount of the fee imposed is not roughly proportional to the impact of the historically permitted, continued use of the San Remo as a tourist/commercial hotel.

C. The fee fails to substantially advance a legitimate government interest.

53. In or about February 1997, plaintiffs offered lifetime leases to all nine residents at the San Remo Hotel. All but one resident, who subsequently died, are still tenants at the San Remo Hotel.

54. On March 5, 1997, after several demands from plaintiffs, the Zoning Administrator approved the variance applications. On March 17, 1997, the time for an administrative appeal of the variance approvals expired, and the variance approvals became final.

55. On or about March 6, 1997, the Zoning Administrator confirmed that plaintiffs had satisfied all of the conditions of their conditional use permit. Therefore, on or about March 6, 1997, the City imposed the replacement housing fee of $567,000 and issued the HCO permit to convert.

56. Despite the arbitrary regulations imposed on plaintiffs by the regulatory schemes imposed by the City, plaintiffs have maintained a continuous, actual and lawful commercial use of the San Remo Hotel as a tourist hotel.

57. The City's application of the 1990 Hotel Ordinance in conjunction with the Zoning Ordinance to plaintiffs' property forces plaintiffs to bear a disproportionate part of the public burden of providing housing to low income and homeless persons, all without due process of law. Not only were plaintiffs required to pay extortionate replacement housing fee exactions, they were also required to offer lifetime leases to existing residents.

58. The City's application of the 1990 Hotel Ordinance, together with the Zoning Ordinance, deprives plaintiffs of their reasonable investment backed expectations.

59. The effect of City's determinations was that any commercial/tourist use at the San Remo Hotel was in jeopardy unless plaintiffs paid what one supervisor called extortionate ransom to the City.

60. In order for plaintiffs to regain the historically permitted commercial use of their property they were required to pay the City a fee of $567,000 and offer lifetime leases to their tenants.

61. Defendants' unlawful requirements that plaintiffs pay $567,000 and offer lifetime leases to their tenants as a condition of their conditional use permit fails to substantially advance legitimate government interests, and forces plaintiffs to bear the public burden of housing the poor, all without just compensation. Accordingly, defendants' unlawful conditions as applied to plaintiffs amounts to an inverse condemnation of their property.

62. By imposing the $567,000 fee and requiring lifetime leases for plaintiffs' tenants, the City violated plaintiffs' rights under the Fifth and Fourteenth Amendments

to the United States Constitution. Plaintiffs have no plain, speedy or adequate remedy in the ordinary course of the law. Any attempt by plaintiffs to obtain relief in state court was futile because the California Courts have consistently refused to recognize the constitutional defects in the Hotel Ordinance. Therefore, plaintiffs' request for declaratory and injunctive relief as hereinafter set forth is justified.

63. Plaintiffs reasonably and in good faith pursued the administrative remedies described herein to mitigate and/or avoid the damages caused by the facially unconstitutional HCO in 1990. Therefore, under the doctrine of equitable tolling, the statute of limitations was tolled from May 1990 until at least April 19, 1993, when this action was filed.

COUNT ONE

(DECLARATION OF THE UNCONSTITUTIONALITY OF THE REPLACEMENT HOUSING REQUIREMENTS OF THE HOTEL ORDINANCE AS INCORPORATED INTO THE CONDITIONS OF APPROVAL OF PLAINTIFF'S ZONING APPROVAL)

64. Plaintiffs reallege paragraphs 1 to 63.

65. An actual controversy has arisen and now exists between plaintiffs and the City regarding their respective rights and duties in that plaintiffs contend and the City denies that the regulatory controls of the ordinances, separately and in concert, facially and as applied to plaintiffs, violate their rights under the Fifth and Fourteenth Amendments to the United States Constitution.

66. Defendants' legislative and administrative actions fail to substantially advance legitimate government interests

and force plaintiffs to bear the public burden of housing the poor, all without just compensation. Accordingly, defendants' actions violated the Takings Clause of the Fifth Amendment to the United States Constitution.

67. Plaintiffs request a judicial declaration as to the validity of each ordinance facially and as applied to plaintiffs.

68. The conditional use permit approved by the City required plaintiffs to pay the City $567,000 and to offer lifetime leases to their tenants. The enforcement of those conditions unlawfully appropriated private property rights in blatant violation of plaintiffs' constitutional rights.

69. Plaintiffs have devoted several years and a substantial sum in attorneys' fees and costs to exhaust all of the available administrative remedies to regain their commercial zoning classification. Plaintiffs have no plain, speedy, or adequate remedy in the ordinary course of law to redress deprivations of their constitutional rights with respect to the ownership and use of their private property. Proceeding in state court was futile, because despite the fact that courts in other jurisdictions have consistently struck down similar legislative schemes and enactments, the state courts in California have failed to protect the rights asserted herein in other cases. Declaratory and injunctive relief is therefore justified.

COUNT TWO

(DEPRIVATION OF CIVIL RIGHTS UNDER 42 U.S.C. § 1983)

70. Plaintiffs reallege paragraphs 1 to 69.

71. The City has established a custom, policy, pattern and practice of enforcing the regulatory provisions of the Hotel Ordinance and the Zoning Ordinance, and in particular the replacement housing requirements against plaintiffs, under color of law, and has deprived plaintiffs of the use of their property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

72. Prior to the effective date of any zoning ordinances prohibiting commercial use of the San Remo, plaintiffs had continuously used the San Remo as a commercial, tourist hotel. At all times such commercial use has been pursuant to and authorized by local law. Therefore, plaintiffs possess a vested right to continue operating the San Remo as a lawful, non-conforming tourist hotel.

73. The City's ordinances have been applied in a successful attempt to extort a $567,000 ransom and to require plaintiffs to offer lifetime leases to their tenants without an individualized determination that continued use of the San Remo as a commercial hotel would result in the loss of housing for low-income, elderly, or disabled persons.

74. Defendants' actions have resulted in the taking of plaintiffs' property under the multi-pronged test established by Penn Central Trans. Co. v. New York City, 438 U.S. 104 (1978)

75. Plaintiffs timely sought administrative relief from the City, and the City's administrative determinations of the allowable use of plaintiffs' property are final.

76. Plaintiffs timely sought judicial review of the City's legislative and administrative actions, and brought an inverse condemnation claim under the California Constitution

in the California state courts. San Remo Hotel v. City and County of San Francisco, San Francisco Superior Court No. 950166. The Ninth Circuit decided that this Court should abstain from deciding this case until after a final decision by the state courts. San Remo Hotel v. City and County of San Francisco, 145 F.3d 1095 (1998). After the Ninth Circuit's decision, plaintiffs prosecuted their claims in the state courts through a final decision by the California Supreme Court, which was issued on March 4, 2002. San Remo Hotel v. City and County of San Francisco, 27 Cal.4th 643 (2002).

77. As a result of that decision by the California Supreme Court, plaintiffs received no compensation from the state courts for the taking of their property.

78. The requirements that plaintiffs pay the City $567,000 and offer lifetime leases to their tenants fail to substantially advance legitimate government interests and force plaintiffs to bear the public burden of housing the poor, all without just compensation.

79. Defendants' refusal to permit the "conversion" of the San Remo Hotel absent payment of the $567,000 ransom and an offer of lifetime leases to the tenants fails to substantially advance legitimate government interests, and forces plaintiffs to bear the public burden of housing the poor, all without just compensation. Accordingly, defendants' requirement that plaintiffs pay $567,000 and offer lifetime leases to their tenants, as applied to plaintiffs, amounts to an inverse condemnation of their property.

80. The City's ordinances and its administrative actions regarding the San Remo violate plaintiffs'

constitutional rights in that they fail to substantially advance legitimate government interests as required by the Fifth Amendment.

81. The City's application of its legislative scheme to the San Remo Hotel does not substantially advance a legitimate government interest because there is not a close nexus between the City's requirement of a $567,000 payment and lifetime leases and any public harm that might result from the continued use of the San Remo in its historically permitted commercial manner. Not only is there an abundance of vacant residential hotel units available in San Francisco (the City-wide vacancy rate under both the 1981 and 1990 Hotel Ordinances has remained consistently between 25 and 35%), no residents would be displaced by such continued commercial use. Consequently, unconditional, continued commercial use of the San Remo by plaintiffs would not result in the problems purportedly remedied by the City's ordinances and administrative actions, i.e., a shortage of available housing for low income, elderly, and disabled persons.

82. The application of the City's ordinances to plaintiffs forces them, and a small group of other property owners, to bear the full cost of providing a general public benefit: housing for low income, elderly and disabled San Francisco residents. This violates the Fifth Amendment, which bars Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

83. The provisions of the City's ordinances, in conjunction with defendants' administrative determinations, which allow cash payments to be made in lieu of compliance with the terms of the ordinances, establish that defendants are

simply attempting to extort valuable resources from plaintiffs and other similarly situated property owners. The HCO's requirement of replacement housing fees has been characterized as "ransom" by the California Court of Appeal. Bullock v. San Francisco, 221 Cal. App.3d 1072, 1101 (1990). In striking down a substantially similar regulation, the New York Court of Appeals recognized that a provision of this kind "amounts to just the sort of exaction which could be classified, not as a 'valid regulation of land use but "an out-and-out plan of extortion.'" Seawall Associates v. New York City, 542 N.E.2d 1059, 1070 (1989).

84. Plaintiffs have suffered damages as result of defendants' unconstitutional actions, including the lost revenues from the restrictions on plaintiffs' use of their property, the costs of pursuing multiple administrative proceedings required by the City and the costs of annual administrative hearings imposed by the Hotel Ordinance. Plaintiffs Tom Field and Robert Field have also suffered severe emotional distress, pain, discomfort, anxiety, humiliation and emotional distress.

85. By reason of the City's threatened actions to enforce the unconstitutional provisions of the 1990 Hotel Ordinance through the mechanism of the conditional use authorization required by the Zoning Ordinance, plaintiffs have suffered, and will suffer irreparable harm and hereby request injunctive relief pursuant to 42 U.S.C. § 1983 to restrain the City from violating plaintiffs' constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, plaintiffs pray for the following relief:

A. Plaintiffs request a judicial declaration by this Court that the replacement housing provisions of the Hotel Ordinance and the conditional use authorization requirements of the Zoning Ordinance, separately and in concert with each other, whether facially or as applied to plaintiffs in particular, violate plaintiffs' right to Due Process of Law under the Fifth and Fourteenth Amendments to the United States Constitution and that those provisions be declared invalid and unenforceable.

B. Plaintiffs request an award of damages in the sum of $567,000 plus interest at the legal rate from December 11, 1996. Plaintiffs request an award of additional damages according to proof.

C. Plaintiffs request an award of costs and attorneys' fees as permitted by law.

D. Plaintiffs request such other and further relief as the Court deems just and proper.

Dated: November ___, 2002.

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**SUPERIOR COURT FOR THE
STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO**

No. 950166

[Filed December 9, 2002]

SAN REMO HOTEL L.P., a Limited Partnership, THOMAS FIELD, an Individual, ROBERT FIELD, an Individual, and T & R INVESTMENT CORP., a California Corporation, Petitioners and Plaintiffs,	)
vs.	)
CITY AND COUNTY OF SAN FRANCISCO, a California Municipal Corporation, SAN FRANCISCO DEPARTMENT OF CITY PLANNING, SAN FRANCISCO BOARD OF	)

PERMIT APPEALS, ZONING ADMINISTRATOR ROBERT PASSMORE, and DOES 1 through 50. Respondents and Defendants.	)

SECOND AMENDED AND SUPPLEMENTAL PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS AND COMPLAINT FOR DAMAGES

Plaintiffs and petitioners San Remo Hotel L.P., Thomas Field, Robert Field, and T & R Investment Corp. ("petitioners" or "plaintiffs"), petition this Court for a writ of mandate under Code of Civil Procedure § 1094.5, directed to respondents City and County of San Francisco and the San Francisco Board of Permit Appeals (hereafter "respondents") and by this verified petition and complaint allege as follows:

1. Plaintiff and petitioner San Remo Hotel L.P. is a California limited partnership. Plaintiffs and petitioners Thomas Field and Robert Field are limited partners of San Remo Hotel L.P. Plaintiff and petitioner T & R Investment Corp. is a California corporation and the general partner of San Remo Hotel L.P.

2. Defendant and respondent City and County of San Francisco ("City") is a California municipal corporation. The City has taken the actions alleged of herein through defendant and respondent Board of Permit Appeals, defendants Department of City Planning, and Zoning Administrator Robert Passmore.

3. Petitioners are ignorant of the true names of defendants Does 1-50, who are responsible for the injuries alleged in this complaint, and therefore sues those defendants

by fictitious names. Petitioners will amend the complaint to allege their true names and capacities when they are ascertained.

FIRST CAUSE OF ACTION

(PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS)

4. Petitioners are the owners of real property located at 2237 Mason Street in San Francisco, CA, commonly known as the San Remo Hotel ("San Remo"), and bring this petition as parties aggrieved by a determination of defendant and respondent Board of Permit Appeals ("BPA") after an evidentiary hearing as required by law.

5. The BPA is authorized and required by the Planning Code and City Charter to conduct evidentiary hearings and to render final administrative decisions in appeals brought by property owners contesting zoning classifications made by the San Francisco Zoning Administrator. The BPA conducted such a hearing on petitioners' appeal and rendered a final decision upholding the Zoning Administrator's determination that the San Remo is limited to residential use under the Planning Code, and that a conditional use permit is required to regain the San Remo's commercial zoning classification.

6. On or about September 9, 1992, the Zoning Administrator issued a written determination that the San Remo is 62 "group housing" units and a residential hotel as defined by Planning Code § 790.47.

7. On or about September 21, 1992, petitioners filed a timely administrative appeal to the BPA, alleging that the Zoning Administrator improperly applied the relevant

Planning Code provisions. Petitioners also alleged that the classification of the San Remo as a residential use under the Planning Code denied petitioners due process of law, constituted a taking of property without just compensation, and denied petitioners equal protection of the laws. On or about November 12, 1992, the Zoning Administrator issued a supplemental determination restating his classification of the San Remo as a residential use under the Planning Code.

8. On or about November 18, 1992, the BPA held a public hearing on petitioners' administrative appeal. On or about December 9, 1992, the BPA denied petitioners' appeal and affirmed the determination of the Zoning Administrator. After petitioners' request for rehearing was denied on January 13, 1993, the BPA's decision and order became final. A true and correct copy of this decision and order is attached as Exhibit A.

9. The BPA's decision and order is invalid under Code of Civil Procedure § 1094.5 for the following reasons:

a. The BPA committed a prejudicial abuse of discretion in that, it failed to proceed in the manner required by law because:

(1) The BPA decision and order fails to recognize petitioners' right to be classified as a "permitted conditional hotel use" under Planning Code § 179(a)(2), and in that the residential use classification imposed by the Zoning Administrator constituted an inverse condemnation of the San Remo.

(2) In reliance upon petitioners' reasonable investment backed expectations and justifiable reliance on the historical commercial use classification of the San Remo, petitioners expended substantial sums of money in capital

improvements. Therefore, the BPA and the Zoning Administrator were required to classify the San Remo as a tourist hotel use under the Planning Code.

b. The BPA failed to issue sufficient findings to justify its decision as required by law. Moreover, the findings are insufficient because they fail to bridge the analytical gap between the evidence presented and the BPA's decision:

(1) The BPA's finding that the Zoning Administrator "liberally construed the ordinances in order to allow maximum flexibility to the San Remo to rent it to tourists during the summer" is not supported by substantial evidence nor does that finding have any basis in law.

(2) The BPA's finding that petitioners described the San Remo as a residential hotel is irrelevant to petitioners' claim of a permitted conditional use under Planning Code § 179(a)(2).

(3) The BPA's finding that there was "ample proof that the San Remo's expectations could or should have been that the law would be applied towards them in the manner that the City has applied them" is not supported by substantial evidence in the administrative record.

(4) The BPA's finding that the "City has consistently and fairly applied the ordinances in question towards the San Remo exactly as it has applied the ordinances towards all other similarly situated hotels" is not supported by any evidence in the record.

(5) The BPA's finding that petitioners "failed to prove that they held, prior to the enactment of the relevant ordinances, a preexisting non-conforming use" is not

supported by any evidence in the record and further fails to address petitioners' claim of a permitted conditional use under Planning Code § 179.

(6) The BPA's finding that "In any event, if they held such a lawful non-conforming use, . . . they abandoned it" is not supported by any substantial evidence contained in the administrative record and fails to address petitioners' claim that the purported abandonment was unlawfully compelled by the enactment of the Residential Hotel Unit Conversion and Demolition Ordinance, San Francisco Administrative Code § 41 et seq. ("HCO").

c. The BPA further abused its discretion by ratifying the Zoning Administrator's use of legally defective interim zoning ordinances in the determination in disregard for petitioners' right to due process of law.

10. The BPA is a local agency. The right to continue an established business is sufficiently personal and important to preclude its elimination by a nonjudicial local agency. A fundamental vested right is at stake because petitioners presented unrebutted testimony that the BPA's decision will cause the closure of the San Remo which has been in continuous operation for more than 80 years. Petitioners have a fundamental vested right to continue the operation of their business as a commercial establishment. Accordingly, the Court's review of the BPA's decision should be under the independent judgment test.

11. Petitioners have exhausted the available administrative remedies required to be pursued by them.

12. Petitioners do not have a plain, speedy, and adequate remedy in the ordinary course of law.

13. If the BPA's decision is allowed to be enforced, petitioners will be irreparably injured in that petitioners' undisputed and continuous summer commercial use of their property will be subject to allegations of illegality, and enforcement actions by the Planning Department and housing advocates. Petitioners' business is financially dependent on the commercial use of the San Remo, particularly during the summer tourist season when the San Remo has always been entitled to unrestricted commercial use. Without the benefit of that commercial use, the San Remo cannot provide petitioners a fair reasonable return on their investment and petitioners will be forced to close the business. Furthermore, the imposition of a stay is not against the public interest because it would merely maintain the status quo and permit petitioners to continue the lawful operation of their business until this action is resolved.

14. As a result of the BPA's action, petitioners have sustained damages as follows: The BPA's decision has inversely condemned the San Remo and interfered with petitioners' reasonable investment backed expectations. The decision also violates petitioners' state constitutional rights by the unfair and discriminatory application of the City's ordinances. The BPA is liable for these damages by reason of its blatant disregard for the rights of petitioners as alleged above, and because the City's ordinances are unconstitutional as applied to petitioners. Petitioners are entitled to recover these damages under Code of Civil Procedure § 1095.

15. Petitioners are obligated to pay attorneys' fees and costs incurred to prosecute this action. Petitioners are entitled to recover their attorneys' fees pursuant to Government Code § 800, because the BPA's actions are arbitrary and capricious and because the BPA acted in blatant disregard for petitioners' constitutional rights.

16. On March 10, 1993, petitioners requested that the BPA prepare a true and correct copy of the administrative record. A true and correct copy of the record will be lodged with the Court before the hearing on this petition.

17. On May 4, 1993, petitioners filed suit in United States District Court alleging that respondents' conduct violated petitioners' federal civil rights. On September 15, 1993, the District Court found that it was "likely that plaintiffs can demonstrate that the City acted arbitrarily and capriciously in refusing to recognize the San Remo's prior non-conforming use" and issued a preliminary injunction against the City.

SECOND CAUSE OF ACTION

(DAMAGES FOR INVERSE CONDEMNATION ARISING OUT OF BPA DECISION CLASSIFYING THE SAN REMO HOTEL AS 62 GROUP HOUSING UNITS)

18. Plaintiffs reallege paragraphs 1 through 17.

19. Prior to the effective date of any zoning ordinances prohibiting commercial use of the San Remo, plaintiffs had continuously used the San Remo as a commercial, tourist hotel. At all times such commercial use has been pursuant to and authorized by local law. Therefore, plaintiffs possess a vested right to continue operating the San Remo as a lawful, non-conforming tourist hotel.

20. The Zoning Administrator's classification of the San Remo Hotel as a 62 units of "group housing" under the Planning Code, as upheld by the BPA on appeal, violates plaintiffs' state constitutional rights in that said decisions fail to substantially advance legitimate government interests as

required by Article I, Section 19, of the California Constitution. Not only is there an abundance of vacant residential hotel units available in San Francisco, no residents protected by the HCO will be displaced by such continued commercial use. Consequently, unconditional, continued commercial use of the San Remo by plaintiffs would not result in the problems purportedly remedied by the Planning Code, i.e., a shortage of available housing for low income, elderly, and disabled persons.

21. The Zoning Administrator's classification of the San Remo Hotel as a 62 units of "group housing" under the Planning Code, as upheld by the BPA on appeal, forces plaintiffs to bear the full cost of providing a general public benefit: housing for low income, elderly and disabled San Francisco residents. This violates the state constitution, which bars Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

22. The Zoning Administrator's classification of the San Remo Hotel as a 62 units of "group housing" under the Planning Code, as upheld by the BPA on appeal, in conjunction with defendants' administrative determinations, which allow cash payments to be made in lieu of compliance with the terms of the ordinances, establish that defendants are simply attempting to extort valuable resources from plaintiffs and other similarly situated property owners. The HCO's requirement of replacement housing fees has been characterized as "ransom" by the California Court of Appeal. (Bullock v. San Francisco (1990) 221 Cal.App.3d 1072, 1101) In striking down a substantially similar regulation, the New York Court of Appeals recognized that a provision of this kind "amounts to just the sort of exaction which could be classified, not as a 'valid regulation of land use but "an out-

and-out plan of extortion." ' " (Seawall Associates v. New York City (1989) 542 N.E.2d 1059, 1070)

23. The City's ordinances have been applied in an attempt to extort a $567,000 ransom from plaintiffs without an individualized determination that continued use of the San Remo as a commercial hotel would result in the loss of housing for low-income, elderly, or disabled persons.

24. The Zoning Administrator's classification of the San Remo Hotel as a 62 units of "group housing" under the Planning Code, as upheld by the BPA on appeal, also precludes all economically viable use of plaintiffs' property.

25. Defendants' actions have resulted in the taking of plaintiffs' property.

26. As a result of that taking, plaintiffs have suffered damages from a reduction in the value of their property and a reduction in the amount of income generated by the property. Plaintiffs' damages exceed $567,000.

27. Plaintiffs have received no compensation for the taking of their property.

28. Plaintiffs have incurred and/or will incur attorneys' fees, appraisal fees, engineering fees and other fees and costs because of this proceeding, which are recoverable pursuant to Code of Civil Procedure § 1036.

THIRD CAUSE OF ACTION

(DAMAGES FOR INVERSE CONDEMNATION ARISING OUT OF CONDITION ON CONDITIONAL USE PERMIT)

29. Plaintiffs reallege paragraphs 1 to 28.

30. On December 11, 1996, plaintiffs paid the $567,000 fee that the City contends is due under the HCO and as a condition of plaintiffs' conditional use permit. That payment was made under protest and was tendered with a letter stating the factual and legal basis for that protest. The fee should be refunded to plaintiffs because:

A. The requirement of a replacement housing fee in this case effects a taking without just compensation under Article 1, Section 19 of the California Constitution.

B. The amount of the fee imposed is not roughly proportional to the impact of the historically permitted, continued use of the San Remo as a tourist/commercial hotel.

C. A conditional use authorization is not required to operate the San Remo in its historically permitted manner as a tourist hotel. The City's requirement that San Remo seek and justify a conditional use authorization is a concerted effort to avoid the preemptive effects of the Ellis Act. (Government Code § 7060 et. seq.) The City is seeking to use the Planning Code and the conditions imposed on the conditional use authorization to prevent San Remo from exercising the rights protected by the Ellis Act. The City is imposing a prohibitive price on the exercise of San Remo's rights under the Ellis Act by precluding any further use of the hotel unless San Remo pays the HCO replacement housing fee. But for the

prohibitive price imposed by the City, San Remo would have exercised their rights under the Ellis Act.

D. The fee fails to substantially advance a legitimate government interest.

E. The requirement of the fee denies San Remo economically viable use of the hotel.

F. The requirement of the fee substantially interferes with the San Remo's rights under Civil Code §§ 1954.25 et. seq. At least 53 of the rooms at the San Remo are commercial property as defined in Civil Code § 1954.26 because: (1) They are not dwelling units as hotel tax is due for their rentals; (2) The San Remo is not a residential hotel because more than 6 rooms are used for transient/daily use and fewer than 20% of the rooms are occupied as a primary residence; (3) Fewer than 20 rooms and fewer than 20% of the rooms were occupied as a primary residence on August 5, 1987; and (4) The San Remo is not a mobile home park.

31. The San Remo Hotel is subject to two overlapping regulatory schemes enacted by the City: Chapter 41 of the San Francisco Administrative Code, the Residential Hotel Unit Conversion and Demolition Ordinance (the "Hotel Ordinance") and San Francisco Planning Code § 722 et. seq., the North Beach Neighborhood Commercial Zoning Ordinance.

32. When plaintiffs purchased the San Remo Hotel in 1970, it was zoned C-2 Commercial and there were no restrictions on its use as a tourist hotel. In 1970, the City's Planning Code made no distinction between residential or tourist use of hotel properties -- both were allowed in a C-2 Commercial zone.

33. When plaintiffs purchased the San Remo Hotel it was in a state of extreme disrepair. In 1973, the City recorded a condemnation notice against the property and required plaintiffs to make substantial repairs to bring the building in compliance with the codes governing commercial hotels. Plaintiffs spent more than $250,000 on the repairs and in 1976 the City issued a Certificate of Final Completion and Occupancy for a 62 room hotel. In 1977, the City issued a Permit of Occupancy authorizing the operation of a hotel with 62 guest rooms.

34. From 1916 to the present, the guest rooms in the San Remo Hotel have been rented primarily to transient and tourist guests on a commercial basis. From at least 1970 through the present, City has collected transient hotel taxes from the commercial use of the San Remo's hotel rooms. In 1987, the City conducted an audit to collect additional tourist hotel taxes allegedly owed by the San Remo Hotel. Each year, from 1970 through the current year, the City issued a hotel license, which does not distinguish between tourist/commercial and residential use, for the San Remo Hotel.

1981 HOTEL ORDINANCE

35. In 1981, without any notice to plaintiffs, the City enacted the first Hotel Ordinance (the "1981 Hotel Ordinance"). Before it was enacted, the City Attorney advised the Board of Supervisors that the ordinance was unconstitutional.

36. The stated purpose of the 1981 Hotel Ordinance was to preserve hotel units for residential use by low income, disabled and homeless persons, by restricting the ability of

hotel owners to convert (i.e., change the use from residential to tourist), alter, replace, or demolish their hotels.

37. The 1981 Hotel Ordinance established seasonal restrictions on the rental of regulated hotel rooms which prohibited the owner from renting vacant hotel units designated as residential to tourists during the winter months only. Most significantly, the 1981 Hotel Ordinance permitted the unrestricted tourist/commercial use of residentially designated units during the summer (May through September).

38. The 1981 Hotel Ordinance restricted the use of residentially designated units during the winter months unless a hotel owner applied for a permit to convert under that law. A permit to convert could only be issued if a hotel owner paid the City ransom in the form of providing replacement housing, or paying an in-lieu fee equal to 40% of the cost of construction and 100% of the cost of site acquisition. The 1981 Hotel Ordinance also imposed civil and criminal penalties for violations.

RE-ZONING

39. Plaintiffs are informed and believe and therefore allege that: Notwithstanding the City's knowledge that the 1981 Hotel Ordinance was unconstitutional, the City decided to enact the ordinance. However, the City decided to further its goal of imposing unconstitutional restrictions on the use of hotels by changing the zoning regulations throughout the City so that it could continue to impose the unconstitutional restrictions even if a Court determined that the Hotel Ordinance was unconstitutional. This was accomplished through a series of interim rezonings, which were finalized after the California Legislature enacted the Ellis Act

(Government Code § 7060 et seq.). In particular, the City enacted 4 different interim zoning ordinances in a period of 5 years that the City contends limit plaintiff's use of the San Remo Hotel, all without notice to plaintiffs.

40. In 1982, the City enacted an interim RC-3 District which purported to require conditional use authorization for conversion to tourist hotel use. A 1984 interim re-zoning ordinance entitled Interim North Beach Neighborhood Commercial Housing Conservation District conceded that the 1982 interim re-zoning was legally defective and purported to require conditional use authorization for conversion of any dwelling units or other housing. The notice sent to affected property owners of this zoning change only described possible restrictions to the conversion of dwelling units, a use the City admits does not include residentially designated hotel rooms. In 1985, without notice, the City adopted the North Beach Neighborhood Commercial Study District which purported to require conditional use authorization for conversion to tourist use. Throughout these years of repeated interim rezonings, plaintiffs continued to operate their hotel as primarily a tourist use as permitted by the 1981 Hotel Ordinance. In reliance on their commercial use rights, plaintiffs also expended an additional $200,000 in improvements to the property. The City continued to issue plaintiffs a hotel license each year and to collect hotel taxes from plaintiffs for their commercial/tourist rentals.

41. In 1987, the City enacted the North Beach Neighborhood Commercial Zoning Ordinance (the "Zoning Ordinance"), which created the North Beach Neighborhood Commercial District. The City's stated purpose was "to ensure the livability and attractiveness of North Beach." The Zoning Ordinance requires a conditional use authorization for new tourist hotels. The Zoning Ordinance protects existing

businesses by recognizing those uses and features which lawfully existed on the effective date of the passage of the Zoning Ordinance as lawful nonconforming or conditional uses.

1990 HOTEL ORDINANCE

42. On May 12, 1990, the City enacted a revised version of the Hotel Ordinance (the "1990 Hotel Ordinance"), which unconstitutionally restricts the rights of ownership and use of plaintiff's private property in the following ways:

(a) The 1990 Hotel Ordinance arbitrarily and without justification prohibits plaintiffs from using the San Remo Hotel as a tourist hotel without payment to the City or a non-profit housing developer of an exorbitant and oppressive in-lieu fee of $567,000.

(b) The 1990 Hotel Ordinance requires any hotel owner who seeks to rent rooms to tourists during the summer to rent the rooms at least 50% of the time to permanent residents during the winter months, thereby subjecting the rooms to the eviction controls of the San Francisco Rent Control Ordinance and often eliminating the possibility of using these rooms as historically permitted tourist rentals during the summer season.

(c) The 1990 Hotel Ordinance fails to provide any administrative hearing procedure for relief on grounds of economic hardship, and fails to consider whether regulated hotel owners may obtain a fair return on investment in establishing conditions for conversion to other uses.

(d) The 1990 Hotel Ordinance arbitrarily mandates oppressive criminal and civil penalties for violation of its provisions.

(e) The 1990 Hotel Ordinance grants legal standing in the form of a private cause of action to nonprofit housing advocates, such as the Tenderloin Housing Clinic, permitting them to sue hotel owners for it's violations. No actual injury need be alleged. As plaintiffs in these lawsuits, non-profit housing advocates have coerced large cash payments from hotel owners in the form of attorney's fees. Additionally, non profit housing advocates have also used the ordinance to challenge plaintiffs request for seasonal administrative relief and, after being unsuccessful at the administrative level, have demanded and received cash payments from plaintiffs in order to forego the housing advocates' rights of appeal under the ordinance.

ADMINISTRATIVE PROCEEDINGS

43. The 1981 Hotel Ordinance required the operator of each hotel in San Francisco to make a declaration specifying the number of rooms occupied by individuals who had resided in their hotel rooms for 32 days or more as of September 23, 1979. Based on that declaration, the City issued an initial unit usage report to the hotel operator certifying the number of residential and tourist units that were permitted in the building. This designation occurred without regard to nor mention of the zoning regulations applicable to the property.

44. In 1981, the San Remo Hotel was operated by Jean Iribarren, who leased it from the plaintiffs. Mr. Iribarren submitted a false declaration, which stated that all of the rooms in the San Remo Hotel were occupied by persons who had resided in their rooms for more than 32 days. Based on

that false declaration, the City classified all 62 of the rooms in the San Remo Hotel as residential under the Hotel Ordinance.

45. Plaintiffs did not receive any notice that a declaration was required nor any notice that Mr. Iribarren had submitted his false declaration. The 1981 Hotel Ordinance only allows appeals for 10 days after the initial unit usage report was issued, which plaintiffs could not have filed because they had no notice of the false declaration nor the City's initial usage report.

46. In May 1990, plaintiffs filed an application with the City to convert the San Remo Hotel's residentially designated hotel rooms to tourist use under the 1990 Hotel Ordinance. Until 1997, the City refused to act on the application.

47. After plaintiffs filed the conversion application under the 1990 Hotel Ordinance, the Planning Department informed plaintiffs that the Zoning Ordinance defines the rooms at the San Remo Hotel as group housing units and therefore plaintiffs must obtain a conditional use permit under the Planning Code to convert its 62 group housing units into a tourist hotel. The City contends that the false declaration submitted by Mr. Iribarren under the 1981 Hotel Ordinance, without notice to plaintiffs, resulted in an abandonment of plaintiffs' commercial zoning rights.

48. Although the Planning Code does not distinguish between residential and tourist/commercial hotels and the Planning Code does not define group housing to include residential hotels, the City contends that by "administrative practice" residential hotels rooms are treated as group housing. The City arbitrarily and without any legal basis

insists that the tourist use actually maintained by plaintiffs, which was legal under the Hotel Ordinance, is not a prior non-conforming use because it has been by "special permission" of the Zoning Administrator. This determination was made despite a 1981 published San Francisco City Attorney Opinion that the HCO is "not a land use regulation" and that the HCO "does not render an existing structure or use a non-conforming structure or use."

49. In July 1990, plaintiffs filed applications for a conditional use permit and environmental review under protest. After a 1 year delay, the City finally issued a Final Negative Declaration stating that the continued tourist operation of plaintiffs' hotel would not have a significant effect on the environment. Thereafter, the City repeatedly and steadfastly refused to schedule a hearing on plaintiffs' application for conditional use authorization. In June of 1992, plaintiffs invoked the protection of the California Permit Streamlining Act (California Government Code §§ 65920 et. seq.) which requires government agencies to act on applications for development permits within specified time frames. Throughout the City's delay in acting on the permit applications, plaintiffs continued to insist that no conditional use permit could be lawfully required in this case.

50. Finally, on August 20, 1992, the City scheduled a public hearing on plaintiffs' application for a conditional use permit. On the day of the public hearing, the City Attorney advised plaintiffs that the Planning Commission was without jurisdiction to adjudicate plaintiffs' claim that the San Remo Hotel was a lawful non-conforming or permitted conditional use as defined by the Zoning Ordinance. The City Attorney further advised plaintiffs that only the Board of Permit Appeals could make such a finding. Plaintiffs agreed to a delay of the Planning Commission hearing so that the Board

of Permit Appeals could hear their claims. The City's conduct throughout the administrative process described herein was intentionally calculated to prevent plaintiffs from seeking judicial relief.

51. On December 9, 1992, the San Francisco Board of Permit Appeals issued an oral decision upholding the determination of the Zoning Administrator that the San Remo Hotel is 62 units of group housing that require conditional use authorization to be rented to tourists even though the Hotel Ordinance allows some tourist rentals. The President of the Board of Permit Appeals stated that it could not rule on the constitutionality of the laws involved in the case, but his view was that the City has forced small hotel owners to assume the social burden of supplying affordable housing, which should be borne by every taxpayer.

52. On January 21, 1993, the Planning Commission approved plaintiffs' application for conditional use authorization on condition that plaintiffs mitigate the "loss of housing" by complying with the replacement housing provisions of the 1990 Hotel Ordinance. The 1990 Hotel Ordinance requires a ransom payment of $567,000 by plaintiffs to the City or non-profit housing corporations. In addition to the payment to replace the "lost housing", the Planning Commission's decision also violates plaintiffs' fundamental rights by requiring plaintiffs to provide lifetime leases to the current residents of the San Remo Hotel. The Planning Commission decision also requires plaintiffs to obtain variances from the floor area ratio limitations and parking requirements created by the Zoning Ordinance.

53. The Planning Code provides for an appeal of a conditional use decision of the Planning Commission to the Board of Supervisors. To make that appeal, plaintiffs were

required to obtain the signatures of thirty-five (35) of the neighboring property owners (owners of at least 20% of the land area within a radius of 300 feet from the exterior limits of the subject property).

54. On April 19, 1993, the Board of Supervisors by a vote of 6-5 rejected plaintiffs' administrative appeal and upheld the decision of the Planning Commission which imposed severe, arbitrary, and unreasonable conditions on plaintiffs' ability to regain their commercial zoning classification. One Supervisor called the decision "organized extortion".

55. Because the San Remo Hotel is a lawful commercial use under zoning, the City may not lawfully impose a requirement that plaintiffs seek and justify parking and floor area ratio variances. However, on May 19, 1993, plaintiffs voluntarily filed applications for the variances under protest.

56. Under Planning Code § 306.2, the City Zoning Administrator was required to hold a public hearing within thirty days after accepting the application on May 18, 1993. The City Zoning Administrator failed to comply with this requirement and instead, intentionally delayed until August 24, 1993 when he held a duly noticed public hearing on the variance applications. Despite repeated requests by plaintiffs, the Zoning Administrator refused to act on the variance applications.

57. City Planning Code § 306.4(d)(1) further provides that if the Zoning Administrator fails to act on a variance application within 60 days from the date of conclusion of the hearing, the applicant shall be entitled "to cause the matter to be placed before the City Planning Commission for decision

at its next following regular meeting." On October 25, 1993, 60 days following the duly noticed public hearing on the variance applications, plaintiffs requested in writing that the matter be immediately set for decision before the City Planning Commission as required by law. The City refused plaintiffs' request and instead the Planning Commission met in closed door executive session to discuss the San Remo matter. Under California Government Code § 65920 et. seq., the variance applications must be deemed approved by operation of law, due to the City's failure to hold a timely hearing and issue a timely decision.

58. On March 5, 1997, after several demands from plaintiffs, the Zoning Administrator approved the variance applications. On March 17, 1997, the time for an administrative appeal of the variance approvals expired, and the variance became finally approved.

59. On or about March 6, 1997, the Zoning Administrator confirmed that plaintiffs had satisfied all of the conditions of their conditional use permit. Therefore, on or about March 6, 1997, the City imposed the replacement housing fee of $567,000 and issued the HCO permit to convert.??

60. Despite the arbitrary regulations imposed on plaintiffs by the regulatory schemes imposed by the City, plaintiffs have maintained a continuous, actual and lawful commercial use of the San Remo Hotel.

61. The City's application of the 1990 Hotel Ordinance in conjunction with the Zoning Ordinance, to plaintiffs' property, forces plaintiffs to bear a disproportionate part of the public burden of providing housing to low income and homeless persons, all without due process of law. Not only

must plaintiffs pay extortionate replacement housing fee exactions, they also must provide lifetime housing to existing residents.

62. The City's application of the 1990 Hotel Ordinance, together with the Zoning Ordinance deprives plaintiffs of economically viable use of their property. The regulatory provisions of the 1990 Hotel Ordinance and the Zoning Ordinance operate to inflict extreme financial losses on plaintiffs. Plaintiffs are thus arbitrarily and capriciously being denied a reasonable rate of return on their investment in the San Remo Hotel without due process of law. As a direct result of the City's conduct, plaintiffs are also being deprived of their reasonable investment backed expectation, and of a reasonable rate of return on their investment all without due process of law.

63. The arbitrary and capricious condition of approval on plaintiffs' conditional use permit requiring pay the City $567,000 as a condition on the continued operation of plaintiffs' business substantially impairs the value of the San Remo Hotel and has had a confiscatory effect on the market value of the property. Under the regulations of the Hotel Ordinance, plaintiffs have always enjoyed an unrestricted commercial/tourist use of their hotel. The effect of City's conditional use decision is that any commercial/tourist use at the San Remo Hotel was in jeopardy because plaintiffs had refused to pay what one supervisor called extortionate ransom to the City.

64. In order for plaintiffs to regain the historically permitted commercial use of their property they were required to pay the City an "in-lieu fee" of $567,000.

65. On May 4, 1993, plaintiffs filed an action against defendants in the United States District Court for the Northern District of California. (San Remo Hotel v. San Francisco, No. 93-1644-DLJ) That action is still pending; therefore, any statutes of limitations applicable to plaintiff's claims were also tolled from May 4, 1993 until this action and complaint were filed.

66. Defendants' unlawful condition of approval requiring plaintiffs' to pay $567,000 as a condition of approval on the conditional use permit fails to substantially advance legitimate government interests, deprives plaintiffs of the opportunity to earn a fair return on their investment, denies plaintiffs economically viable use of their property, and/or force plaintiffs to bear the public burden of housing the poor, all without just compensation. Accordingly, defendants' unlawful condition of approval requiring plaintiffs' to pay $567,000 as applied to plaintiffs amounts to an inverse condemnation of their property.

FOURTH CAUSE OF ACTION

(DAMAGES FOR INVERSE CONDEMNATION ARISING OUT OF HOTEL ORDINANCE)

67. Plaintiffs reallege paragraphs 1 to 66.

68. The HCO, and specifically the requirement that plaintiffs' pay the City $567,000 to obtain an HCO permit to convert, fails to substantially advance legitimate government interests, deprives plaintiffs of the opportunity to earn a fair return on their investment, denies plaintiffs economically viable use of their property, and forces plaintiffs to bear the public burden of housing the poor, all without just compensation.

69. Defendants' refusal to permit the "conversion of the San Remo Hotel absent payment of the $567,000 ransom under the HCO fails to substantially advance legitimate government interests, deprives plaintiffs of the opportunity to earn a fair return on their investment, denies plaintiffs economically viable use of their property, and/or force plaintiffs to bear the public burden of housing the poor, all without just compensation. Accordingly, defendants' requirement that plaintiffs pay $567,000 in exchange for the issuance of a permit to convert, as applied to plaintiffs, amounts to an inverse condemnation of their property.

70. Thus, plaintiffs are entitled to a refund of the $567,000 that was tendered to defendants on December 11, 1996.

FIFTH CAUSE OF ACTION

(DAMAGES FOR INVERSE CONDEMNATION ARISING OUT OF REGULATORY SCHEME AS A WHOLE)

71. Plaintiffs reallege paragraphs 1 to 70.

72. The City's ordinances and its administrative actions regarding the San Remo violate plaintiffs' state constitutional rights in that they fail to substantially advance legitimate government interests as required by Article I, Section 19, of the California Constitution.

73. The City's application of its legislative scheme to the San Remo does not substantially advance a legitimate government interest because there is not a close nexus between the City's demand for $567,000 and any public harm that might result from the continued use of the San Remo in

its historically permitted commercial manner. Not only is there an abundance of vacant residential hotel units available in San Francisco, no residents protected by the HCO will be displaced by such continued commercial use. Consequently, unconditional, continued commercial use of the San Remo by plaintiffs would not result in the problems purportedly remedied by the HCO, i.e., a shortage of available housing for low income, elderly, and disabled persons.

74. The application of the City's ordinances to plaintiffs forces them, and a small group of other property owners, to bear the full cost of providing a general public benefit: housing for low income, elderly and disabled San Francisco residents. This violates the state constitution, which bars Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

75. The provisions of the City's ordinances, in conjunction with defendants' administrative determinations, which allow cash payments to be made in lieu of compliance with the terms of the ordinances, establish that defendants are simply attempting to extort valuable resources from plaintiffs and other similarly situated property owners. The HCO's requirement of replacement housing fees has been characterized as "ransom" by the California Court of Appeal. (Bullock v. San Francisco (1990) 221 Cal. App.3d 1072, 1101) In striking down a substantially similar regulation, the New York Court of Appeals recognized that a provision of this kind "amounts to just the sort of exaction which could be classified, not as a 'valid regulation of land use but "an out-and-out plan of extortion.'" (Seawall Associates v. New York City (1989) 542 N.E.2d 1059, 1070)

76. The City's ordinances have been applied in an attempt to extort a $567,000 ransom from plaintiffs without an individualized determination that continued use of the San Remo as a commercial hotel would result in the loss of housing for low-income, elderly, or disabled persons.

77. The City's ordinances and defendants' administrative actions also preclude all economically viable use of plaintiffs' property.

78. Defendants' actions have resulted in the taking of plaintiffs' property.

79. As a result of that taking, plaintiffs have suffered damages from a reduction in the value of their property and a reduction in the amount of income generated by the property. Plaintiffs' damages exceed $567,000.

80. Plaintiffs have received no compensation for the taking of their property.

81. Plaintiffs have incurred and/or will incur attorneys' fees, appraisal fees, engineering fees and other fees and costs because of this proceeding, which are recoverable pursuant to Code of Civil Procedure § 1036.

WHEREFORE, petitioners and plaintiffs the San Remo Hotel L.P., Thomas Field, Robert Field, and T & R Investment Corp. pray for relief as follows:

1. For a peremptory writ of mandate, pursuant to Code of Civil Procedure § 1094.5, directed to respondents, compelling them, their employees, agents, officers and all persons acting on their behalf or in concert with them to recognize and acknowledge that the San Remo is a permitted

conditional hotel use pursuant to the San Francisco Planning Code, California law and the United States Constitution;

2. Petitioners recover their damages according to proof pursuant to Code of Civil Procedure § 1095;

3. Plaintiffs request an award of damages in the sum of $567,000 plus interest at the legal rate from December 11, 1996;

4. Plaintiffs request an award of costs and attorneys' fees as permitted by law; and

5. For such other relief as the Court deems just and proper.

Dated: March ___, 1997.

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By_____
Paul F. Utrecht

Attorneys for Petitioners and Plaintiffs San Remo Hotel L.P., Thomas Field, Robert Field, and T & R Investment Corp.

VERIFICATION

I, the undersigned, say:

I am a petitioner in this proceeding. The facts alleged in ¶¶ 1-17 of the above second amended and supplemental petition and complaint are true of my own knowledge. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed on March 25, 1997.

_____

Petitioner Thomas Field

RESERVED FEDERAL CLAIMS

SIXTH CAUSE OF ACTION

DECLARATION THAT THE REGULATORY SCHEME IN CONJUNCTION WITH THE CITY'S ADMINISTRATIVE DETERMINATIONS REGARDING PLAINTIFF'S PROPERTY CONSTITUTE AN AS APPLIED TAKING IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS

82. Plaintiffs reallege paragraphs 1 to 81. This cause of action is alleged in the alternative to the fifth cause of action.

83. The Regulatory Scheme and the City's administrative actions as applied to plaintiff violate the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution.

SEVENTH CAUSE OF ACTION

DECLARATION THAT THE REGULATORY SCHEME IN CONJUNCTION WITH THE CITY'S ADMINISTRATIVE DETERMINATIONS REGARDING PLAINTIFFS' PROPERTY VIOLATE PLAINTIFFS' EQUAL PROTECTION, SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

84. Plaintiffs reallege paragraphs 1 to 84.

85. Despite the City's arbitrary application of the Regulatory Scheme, plaintiffs have maintained a continuous, actual and lawful tourist use of the San Remo Hotel.

86. The City's application of the Regulatory Scheme deprives plaintiffs of economically viable use of their property. The Regulatory Scheme operates to inflict extreme financial losses on plaintiffs. Plaintiffs are thus arbitrarily and capriciously being denied a reasonable rate of return on their investment in the San Remo Hotel without due process of law. As a direct result of the City's conduct, plaintiffs are also being deprived of their reasonable investment backed expectation, and of a reasonable rate of return on their investment all without due process of law.

87. The City has established a custom, policy, pattern and practice of enforcing the Regulatory Scheme against the San Remo Hotel and other hotels, and in particular the ransom provision of the Hotel Ordinance against plaintiffs, under color of law, and has deprived plaintiffs of the use of their property and of a fair rate of return on their investment in violation of their equal protection, substantive and procedural due process rights. Thus, the City has arbitrarily interfered with plaintiffs' private property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

EIGHTH CAUSE OF ACTION

DAMAGES AND INJUNCTIVE RELIEF FOR VIOLATION OF CIVIL RIGHTS PURSUANT TO 42 U.S.C. § 1983

88. Plaintiffs reallege paragraphs 1 to 88.

89. By reason of the City's application of the unconstitutional Regulatory Scheme, plaintiffs have suffered, and will suffer irreparable harm and hereby request injunctive relief pursuant to 42 U.S.C. § 1983 to restrain the City from violating plaintiffs' constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution.

90. Plaintiffs have suffered damages as result of the City's unconstitutional actions, including the lost revenues from the restrictions on their use of the property, the reduced value of their property caused by the unconstitutional restrictions and the costs of pursuing multiple administrative proceedings required by the City.

Dated: March ___, 1997.

ANDREW M. ZACKS
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PAUL F. UTRECHT
LAW OFFICES OF PAUL F. UTRECHT
235 Montgomery Street, Suite 810
San Francisco, CA 94104

By_____
Paul F. Utrecht

Attorneys for Petitioners and Plaintiffs San Remo Hotel L.P., Thomas Field, Robert Field, and T & R Investment Corp.

PROOF OF SERVICE

I, Christina Lauridsen, declare as follows:

I am over eighteen years of age and not a party to the within action; I am employed at the Law Offices of Paul F. Utrecht, and at his direction I served the within pleadings; that my business address is 235 Montgomery Street, Suite 810, San Francisco, California 94104.

On March 25, 1997, I served:

SECOND AMENDED AND SUPPLEMENTAL PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS AND COMPLAINT FOR DAMAGES

by placing true copies thereof in an envelope addressed to:

Andrew W. Schwartz
Deputy City Attorney
1390 Market Street, 6th Floor
San Francisco, CA 94102

that the envelope was sealed and deposited in the mail with the postage thereon fully prepaid; and that the envelope was deposited with the United States Postal Service at San Francisco, California, for mailing on that same date.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 25, 1997.

_____
Christina Lauridsen

SUPREME COURT OF THE UNITED STATES

No. 04-340

[Decided December 10, 2004]

San Remo Hotel, L.P., et al.
Petitioners

v.

City and County of San Francisco, et al.
Respondents

Judges: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsberg, Breyer.

OPINION

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted limited to Question 1 presented by the petition.

Supreme Court, U.S.
FILED
JAN 24 2005
OFFICE OF THE CLERK

(13)

No. 04-340

In the Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T&R INVESTMENT CORP.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The City and County of San Francisco adopted an ordinance that prohibited hotels from continuing their historic, duly-licensed operation as hotels, but allowed hotel owners to avoid those restrictions by paying an exaction. Petitioners brought this action challenging the exaction based on the Takings Clause of the Fifth Amendment and 42 U.S.C. § 1983. The United States Court of Appeals for the Ninth Circuit initially refused to reach the merits of the constitutional challenge, finding that petitioners were required to ripen their claim by seeking compensation in state court under *Williamson County Planning Commission v. Hamilton Bank of Johnson City*. Once the claim was ripe, the Ninth Circuit again refused to reach the merits of the constitutional challenge, finding that the claim was barred by issue preclusion. This Court granted the petition for certiorari limited to the following question:

Is a Fifth Amendment Takings claim barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners incorporate the disclosure statement in the Petition for Certiorari.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding and Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions at Issue 1

Statement of the Case 2

A. Statement of Facts 2

B. Procedural History 4

Summary of Argument 7

I. THIS COURT'S DECISION IN *WILLIAMSON COUNTY* WAS NOT INTENDED TO BAR TAKINGS CLAIMS FROM THE FEDERAL COURTS 10

II. THE NINTH CIRCUIT'S DECISION CREATES A TRAP THAT PRECLUDES ALL FEDERAL COURTS FROM REVIEWING THE MERITS OF FEDERAL TAKINGS CLAIMS 14

III. CONTRARY TO THE CITY'S ARGUMENTS, THE NINTH CIRCUIT'S RULE IS NOT REQUIRED BY THE FULL FAITH AND CREDIT ACT 17

IV. EVEN IF THIS COURT AGREES THAT ISSUE PRECLUSION SHOULD APPLY IN SOME TAKINGS CASES, THE NINTH CIRCUIT ERRED BY APPLYING ISSUE PRECLUSION IN THIS CASE 19

Conclusion 22

Joint Appendix

Relevant Docket Entries . . . . . J.A. 1

Portions of Appellants' Opening Brief filed in the Ninth Circuit on Jan. 13, 1997 (Cover, Table of Contents and pages 2 and 18-21) . . . . . J.A. 50

Portions of Appellants' Reply Brief filed in the Ninth Circuit on March 12, 1997 (Cover, Table of Contents and pages 1-2 and 8-10) . . . . . J.A. 60

Third Amended Complaint filed in the District Court on Nov. 14, 2002 . . . . . J.A. 69

Second Amended Complaint originally filed in state court, filed as part of a Request for Judicial Notice in the District Court on Dec. 9, 2002 . . . . . J.A. 96

United States Supreme Court Order Granting Petition for Writ of Certiorari Limited to Question 1 Presented dated Dec. 10, 2004 . . . J.A. 129

The following opinions, orders, and ordinance have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Appendix A - Ninth Circuit Order Denying Petition for Rehearing *En Banc* - 6/9/04 . . . . . 1a

Appendix B - Ninth Circuit Opinion - 4/14/04 . . . . 3a

Appendix C - District Court Order - 4/16/03 . . . . 22a

Appendix D - District Court Order - 10/15/02 . . . 53a

Appendix E - Supreme Court of California Opinion - 3/4/02 . . . . . 106a

Appendix F - San Francisco Residential Hotel Unit Conversion and Demolition Ordinance 195a

TABLE OF AUTHORITIES

Cases

Allen v. McCurry, 449 U.S. 90(1980) . . 12, 17, 18, 20

American Continental Ins. Co. v. American Cas. Co., 86 Cal.App. 4th 929, 103 Cal. Rptr.2d 632 (2001) 20, 21

Breneric Associates v. City of Del Mar, 69 Cal.App.4th 166, 81 Cal.Rptr.2d 324 (1998) 15

Dodd v. Hood River County, 59 F.3d 852 (9th Cir.1995) (*Dodd I*) 19

Dodd v. Hood River County, 136 F.3d 1219 (9th Cir. 1998) (*Dodd II*) 19

Dolan v. City of Tigard, 512 U.S. 374 (1994) 15

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 12, 13, 14, 17, 18

Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275 (4th Cir. 1998) 10

Haring v. Prosise, 462 U.S. 306 (1983) 18

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993) 2

Melillo v. City of New Haven, 249 Conn. 138, 732 A.2d 133 (1999) 15

Migra v. Warren City School District Board, 465 U.S. 75 (1984) 17, 18, 19, 20

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941) 5, 6, 9, 12, 13, 14

San Remo Hotel v. City and County of San Francisco, 145 F.3d 1095 (9th Cir. 1998) (*San Remo I*) 5

San Remo Hotel v. City and County of San Francisco, 27 Cal.4th 643, 41 P.3d 87, 117 Cal.Rptr.2d 269 (2002) (*San Remo II*) 1, 5, 6, 15, 21

San Remo Hotel, L.P. v. City and County of San Francisco, 364 F.3d 1088 (9th Cir. 2004) (*San Remo III*) 1, 6, 7, 18, 19

San Remo Hotel v. City and County of San Francisco, 100 Cal.Rptr.2d 1 (Cal.Ct.App. 2000) 5

Santini v. Connecticut Hazardous Waste Management Service, 342 F.3d 118 (2d Cir. 2003) 9, 12, 13, 15, 17, 21

Wilkinson v. Pitkin County Bd. of County Commissioners, 142 F.3d 1319 (10th Cir. 1998) . 7

Williamson County Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) . *passim*

Constitutional and Statutory Provisions, Rules

U.S. Const. Fifth Amend. . . . . *passim*
28 U.S.C. § 1254(1) 1
42 U.S.C. § 1983 . . . . . *i*,11,17,18,19
HCO § 41.3(m) 4
HCO § 41.4(n) 2
HCO § 41.4(q) 2
HCO § 41.13(a)(4) 4
HCO § 41.19(a)(3) 4
Fed. R. Civ. P. 12(b)(6) 6
S. Ct. Rule 13.1 1

Other Authorities

Berger, Michael and Kanner, Gideon, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671 (2004) 16

Breemer, J. David, *Overcoming Williamson County's Troubling State Procedures Rule*, 18 J. Land Use & Envtl. L. 209 (2003) 16

Mandelker, Daniel, Testimony on H.R. 1534 Before the House Judiciary Committee, 31 Urb. Law. 232 (1999) 16

Meacham, Madeline J., *The Williamson Trap*, 32 Urb. Law. 239 (2000) 16

Roberts, Thomas, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37 (1995) 16

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing en banc is unreported and is reproduced as Petition Appendix ("Pet. App.") A. The opinion of the Ninth Circuit is reported as *San Remo Hotel, L.P. v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004), and is reproduced as Pet. App. B. The orders of the United States District Court for the Northern District of California are unreported and reproduced as Pet. App. C and Pet. App. D. The opinion of the California Supreme Court is reported as *San Remo Hotel v. City and County of San Francisco*, 27 Cal.4th 643, 41 P.3d 87, 117 Cal.Rptr.2d 269 (2002), and is reproduced as Pet. App. E.

JURISDICTION

The opinion of the Ninth Circuit was filed and entered on April 14, 2004. Pet. App. B. The order of the Ninth Circuit denying the petition for rehearing en banc was entered on June 9, 2004. Pet. App. A. The petition for writ of certiorari was timely filed under Rule 13.1 of the Rules of the Supreme Court on September 7, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation."

The Residential Hotel Unit Conversion and Demolition Ordinance adopted by the City and County of San Francisco,

as codified at Chapter 41 of the San Francisco Administrative Code, is reproduced as Pet. App. F.

STATEMENT OF THE CASE

A. Statement of Facts[1]

Petitioners San Remo Hotel, L.P., Thomas Field, Robert Field and T&R Investment Corp. (the "Field Brothers") own the San Remo Hotel. J.A. 70-71. The hotel was built in 1906 and has been operated as a tourist hotel since the 1950s. J.A. 71. The Field Brothers bought the San Remo Hotel in 1970 when it was fully-licensed as a tourist hotel. J.A. 71-72. After the Field Brothers restored the building in 1976, the City issued new permits and licenses that authorized unlimited tourist use of the hotel. J.A. 72. Since then, the City has collected hotel taxes based on the tourist use of the hotel. J.A. 72, 76.

The City adopted the first version of the Residential Hotel Unit Conversion and Demolition Ordinance ("HCO" or "Hotel Ordinance") in 1981, despite the City Attorney's advice that it was unconstitutional. J.A. 73. Under the Hotel Ordinance, rooms were designated as residential units based on their use during a particular 32-day period: from August 22 to September 23, 1979. HCO § 41.4(n) and (q), Pet. App. 202a, 203a. Thus, a room was designated as a residential unit

---

[1] This case was decided on a motion to dismiss under Fed.R.Civ.P. 12(b)(6); therefore, all of the facts alleged in the complaint must be accepted as true. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993). This statement of facts is based on the Third Amended Complaint, which is reproduced in the Joint Appendix ("J.A.") at 69-95.

if it was occupied by the same person during those 32 days in 1979, even if the room had never before been rented to a residential tenant. J.A. 78.

The consequence of being designated a residential unit was that the room could only be rented to tourists on a daily basis during the tourist season from May 1 to September 30. J.A. 73-74. During the rest of the year, only weekly or monthly rentals were allowed. J.A. 73. The Hotel Ordinance allowed hotel owners to obtain a permit to rent the residential units to tourists year-round. J.A. 74. But, that permit would be subject to a condition requiring the payment of a replacement housing fee or the creation of new residential units at another location either by construction of new units or rehabilitation of unusable units. J.A. 74. The replacement housing fee was set at 40% of the cost of constructing replacement housing plus the site acquisition cost. J.A. 74.

The San Remo Hotel's 62 rooms were mistakenly designated as residential units even though there were only 10 residential tenants. J.A. 78-79. Nevertheless, the San Remo Hotel (like many hotels) was able to continue its historical use as a primarily tourist hotel. J.A. 79. As allowed by the Hotel Ordinance, the Field Brothers rented the rooms to tourists during the tourist season, did not rent rooms on a daily basis during the rest of the year when there was little or no tourist business, and kept about 10 residential tenants year-round. J.A. 73-74, 78-79.

In 1990, the City adopted a new version of the Hotel Ordinance that severely restricted the Field Brothers' operation of the hotel. J.A. 77. The new ordinance reduced the allowed daily rental to tourists during the tourist season from 100% to 25% of the designated residential units; prohibited even that 25% tourist use unless the rooms were

rented to residents during the rest of the year (thereby subjecting those rooms to San Francisco's rent control ordinance, which severely restricts evictions); and doubled the replacement housing fee imposed on permits to escape the Hotel Ordinance's use restrictions. J.A. 77; HCO §§ 41.13(a)(4), 41.19(a)(3), Pet. App. 227a, 236a-237a. Moreover, the 1990 version of the Hotel Ordinance explicitly states that the City doubled the replacement housing fee from 40% to 80% of the cost of constructing new housing because adequate public funding was no longer available. J.A. 77-78; HCO § 41.3(m), Pet. App. 198a.

The 1990 Hotel Ordinance had an enormous impact on the San Remo Hotel because it eliminated the Field Brothers' right to continue the historical use of their hotel. J.A. 79. As a result, they immediately applied for a permit to escape the new restrictions. J.A. 80. The Field Brothers then participated in three years of administrative proceedings before the City's Zoning Administrator, Board of Permit Appeals, and Planning Commission. J.A. 80-83. The Planning Commission did grant a permit for the San Remo Hotel, but imposed a condition: The Field Brothers were required to pay the City an exaction of $567,000 under the Hotel Ordinance. J.A. 83. The Field Brothers appealed that decision to the Board of Supervisors, which affirmed the Planning Commission's decision by a 6-5 vote. J.A. 84. A dissenting Supervisor called the City's exaction "organized extortion." J.A. 84.

B. Procedural History

In 1993, the Field Brothers brought this federal court action to challenge the exaction imposed by the City. J.A. 1. The district court issued a preliminary injunction, finding that the Hotel Ordinance was facially unconstitutional. J.A. 7.

Three years later, the district court granted the City's motion for summary judgment and dissolved the preliminary injunction. J.A. 24. The district court found that the as-applied takings claims were unripe and that the facial takings claims were barred by the statute of limitations. J.A. 24; *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1100 (9th Cir. 1998) ("*San Remo I*").

Two years later, the Ninth Circuit affirmed the district court's ruling that the as-applied takings claims were unripe because the Field Brothers had not sought compensation in the state courts as required by *Williamson County Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *San Remo I*, 145 F.3d at 1102. The Ninth Circuit directed the district court to stay the facial takings claims based on the substantial advancement test under *Pullman* abstention. *San Remo I*, 145 F.3d at 1101-1102.

Two years later, the California Court of Appeal reversed the state trial court's order sustaining the City's demurrer to the state law compensation claims, finding that heightened scrutiny applies to the exaction even though it was imposed by legislation. *San Remo Hotel v. City and County of San Francisco*, 100 Cal.Rptr.2d 1, 9-11 (2000). The state court of appeal also reversed the trial court's order denying the petition for writ of administrative mandate, which challenged the administrative determination that a conditional use permit was required for tourist use of the San Remo Hotel. *Id.* at 16-18.

Two years later, the California Supreme Court reversed the state court of appeal in a 4-3 decision. *San Remo Hotel v. City and County of San Francisco*, 27 Cal.4th 643 (2002) ("*San Remo II*"), Pet. App. 106a-194a. The state supreme court rejected the Field Brothers' state law claims for

compensation, finding that the trial court had properly sustained the City's demurrer to the complaint because it failed to state facts sufficient to constitute a cause of action. *San Remo II*, Pet. App. 144a-155a. In particular, that court found that under the state constitution, there is no heightened scrutiny for exactions imposed by legislation. *San Remo II*, Pet. App. 130a-144a. The state supreme court also affirmed the trial court's denial of the petition for writ of administrative mandate on the grounds that a conditional use permit was required even if only some of the 62 hotel rooms had been in residential use. *San Remo II*, Pet. App. 122a-130a. All seven justices agreed that the state court had not decided any federal question because the Field Brothers "explicitly" reserved their federal claims for determination by the federal courts. *San Remo II*, Pet. App. 107a, n.1, 170a, 194a.

One year later, the district court granted the City's motion to dismiss the federal court complaint under Fed.R.Civ.P. 12(b)(6). The district court found that the Field Brothers' federal takings claims were barred by issue preclusion, based on the state supreme court decision, and the statute of limitations. Pet. App. 50a-51a, 85a, 73a, 90a. In deciding that the takings claims were barred by issue preclusion, the district court rejected the following arguments against issue preclusion: (1) the state court proceedings were required to ripen the takings claims under *Williamson County*, (2) the state court proceedings resulted from *Pullman* abstention, and (3) under California law, the judgment should not be given preclusive effect. Pet. App. 37a-51a, 85a-100a

Finally, eleven years after this action was filed, the Ninth Circuit affirmed the district court solely on the ground that the Field Brothers' claims were barred by issue preclusion and did not reach the statute of limitations issue. *San Remo Hotel v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004) (*"San Remo III"*), Pet. App. 12a-21a, 11a. The Ninth Circuit held that issue preclusion can bar federal takings claims even though the state court proceedings were required to ripen those claims. *San Remo III*, Pet. App. 12a-16a. The Ninth Circuit held that the claims were barred by issue preclusion because "the determination of the state takings claims was 'an equivalent determination' of the federal takings claims." *San Remo III*, Pet. App. 17a, citing *Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995) (*"Dodd I"*). The Ninth Circuit denied the Field Brothers' petition for rehearing en banc, with no judge requesting a vote on the petition. Pet. App. 2a.

SUMMARY OF ARGUMENT

Most takings cases never make it through the procedural hurdles this Court established in *Williamson County* to ripen a federal takings claim. Indeed, 20 years after this Court's decision in *Williamson County*, the Field Brothers are among the few plaintiffs who have met this Court's requirements for a federal court to hear a takings case. The Field Brothers' gauntlet began in 1990 with administrative proceedings and ended in 2002 with the California Supreme Court's denial of their state compensation claims.

Despite the Field Brothers' extraordinary path to this Court, they have never asked for anything more than what was promised by this Court's opinion in *Williamson County*: They asked the lower federal courts, and now ask this Court, only that a federal court hear the merits of the federal takings claims that they filed in federal court in 1993.

In this case, there is no doctrinal or public-policy barrier to that result. The purpose of the *Williamson County* requirement that takings plaintiffs first go to state courts was

not to bar takings claims from the federal courts. Its purpose was to give the state courts a chance to provide just compensation *before* the federal courts considered the federal constitutional claim. Once the state courts refuse to provide compensation, the duty of the federal courts is clear: decide the federal constitutional claim on the merits.

That was the duty of the lower courts in this case. The Field Brothers undeniably met this Court's ripeness requirements for a federal determination of their takings challenge. Hence, the district court was required to hear their challenge and the Ninth Circuit was required to assure that the district court do so.

Instead, the lower courts defied their duty to hear the claim, finding that -- because the California courts rejected the Field Brothers' claims under state law -- the federal courts need not consider the federal takings claims on their merits. The lower courts were wrong for two independent reasons:

First, because the state court proceedings were required to ripen the federal takings claim under *Williamson County*, the federal courts were required to disregard the decision of the state court. Indeed, the state court did not even consider the federal constitutional claim, much less rule on it. The Field Brothers' narrow loss of their state claims in state court should hardly defeat the federal claims that were, at last, ripened by that loss.

That was the holding of the Second Circuit, which concluded that state court proceedings required to ripen federal takings claims should be given no preclusive effect:

> It would be both ironic and unfair if the very procedure that the Supreme Court required [takings plaintiffs] to follow before bringing a Fifth Amendment takings claim – a state court-inverse condemnation action – also precluded [them] from ever bringing a Fifth Amendment takings claim.

Santini v. Connecticut Hazardous Waste Management Service, 342 F.3d 118, 130 (2003). The Second Circuit recognized that the purpose of the *Williamson County* ripeness doctrine and the *Pullman* abstention doctrine is to postpone federal court decision of a federal constitutional issue until the state courts have decided state law issues that would moot the federal constitutional issue. *Santini*, 342 F.3d at 129-130. That purpose is hardly served by the Ninth Circuit's conclusion that the federal courts' decision is not merely postponed, but abdicated entirely.

Second, even if issue preclusion applies to some takings cases, the Ninth Circuit's decision to apply it in this case was still wrong. The Ninth Circuit's rule requires the application of the state law of issue preclusion. But, while the Ninth Circuit mentioned California law of issue preclusion, it did not apply that state's law. The Ninth Circuit applied the "equivalent determination" test announced in *Dodd I*, which was a statement of Oregon law. The Ninth Circuit's application of the Oregon test to determine whether to give preclusive effect to this California judgment was wrong.

In sum, this Court made the work of plaintiffs seeking a federal forum for their takings claims enormously difficult. But, that work was diligently done by the Field Brothers. The Ninth Circuit refused to reward their efforts by reaching the merits of the Field Brothers' federal takings claims. Under this Court's *Williamson County* decision, no state preclusion law is relevant. And, even if the Second Circuit were wrong and state issue-preclusion rules do apply, the Ninth Circuit

was required to consult the right state's laws. Under California law, as under *Williamson County*, the federal courts are required to decide the Field Brothers' federal takings claims on the merits.

I. THIS COURT'S DECISION IN *WILLIAMSON COUNTY* WAS NOT INTENDED TO BAR TAKINGS CLAIMS FROM THE FEDERAL COURTS

The Field Brothers spent 12 years, beginning with proceedings before the City's administrative agencies in 1990 and ending with the California Supreme Court's denial of compensation in 2002, to satisfy both prongs of *Williamson County*'s ripeness requirement. The Field Brothers understandably believed that those procedural steps were required to ripen their federal takings claims, and would not extinguish their claims. Ultimately, as a result of the Field Brothers' efforts to satisfy both prongs of the ripeness test, their case has "passed through procedural purgatory and wended its way to procedural hell." *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 284 (4th Cir. 1998).

Even the most careful reading of this Court's opinion in *Williamson County* gives no indication of the procedural quagmire it would spawn in the hands of the lower courts. The opinion does not even suggest that the ripening of takings claims will extinguish them. Instead, this Court expressly stated two possible results when takings plaintiffs seek compensation in the state courts: (1) the state courts could award compensation and moot the federal constitutional claim; or (2) the state courts could deny compensation and ripen the federal takings claim. *Williamson County*, 473 U.S. at 194-195. In short, as this Court stated clearly and repeatedly, takings plaintiffs may ripen their federal takings claims and

then pursue them in federal court:

> [W]e conclude that respondent's claim is premature.
>
> . . . . .
>
> Because respondent has not yet . . . utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not ripe.
>
> . . . . .
>
> A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so.
>
> . . . . .
>
> [T]he property owner cannot claim a violation of the Just Compensation Clause until it has used the [state] procedure and been denied just compensation.
>
> . . . . .
>
> [U]ntil [respondent] has utilized that [state] procedure, its taking claim is premature.
>
> . . . . .
>
> In sum, respondent's claim is premature, . . .

Williamson County, 473 U.S. at 185, 186, 194-195, 197, 200.

The Court's rationale for requiring takings plaintiffs to seek compensation using state procedures was clear:

> The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.

Williamson County, 473 U.S. at 194 n. 13. That rationale is based on the fundamental purpose of the Fifth Amendment:

> The basic understanding of the Amendment makes clear that it is designed not to limit the governmental

> interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.

First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304, 315 (1987).

Nothing in the *Williamson County* opinion even suggests that the outcome of state compensation procedures could preclude a federal takings claim. Indeed, as the Second Circuit concluded, that result would be inconsistent with this Court's opinion in *Williamson County*. *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 127-130 (2003). The same reasons that compelled this Court to create an exception to issue preclusion rules for state court proceedings required by *Pullman* abstention also compelled the Second Circuit's decision. *Santini*, 342 F.3d at 128-129, discussing *England v. Louisiana State Board of medical Examiners*, 375 U.S. 411 (1964). The Second Circuit explained that:

> It would be both ironic and unfair if the very procedure that the Supreme Court required [takings plaintiffs] to follow before bringing a Fifth Amendment takings claim - a state court-inverse condemnation action - also precluded [them] from ever bringing a Fifth Amendment takings claim.

Santini, 342 F.3d at 130; see also *Allen v. McCurry*, 449 U.S. 90, 101 n. 17 (1980), citing *England*, 375 U.S. at 416 and n. 7 (*Pullman* abstention serves "only to postpone rather than to abdicate jurisdiction, since its purpose is to determine whether resolution of the federal question is even necessary").

As the Second Circuit concluded, any procedural difference between the *Williamson County* ripeness doctrine and the *Pullman* abstention doctrine "is not a meaningful one." *Santini*, 342 F.3d at 129. The Second Circuit emphasized:

> "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims."

Santini, 342 F.3d at 128, quoting *England*, 375 U.S. at 415.

The Second Circuit refused to apply issue preclusion because it would create a "Catch-22 for takings plaintiffs": under *Williamson County*, they are required to seek compensation in state court to make the federal takings claims ripe, but once the federal takings claims are ripe, they would be defeated by the preclusive effect of the state court judgment. *Santini*, 342 F.3d at 127. As the Second Circuit explained, "[w]e do not believe that the Supreme Court intended in *Williamson County* to deprive all property owners . . . of the opportunity to bring Fifth Amendment takings claims in federal court." *Santini*, 342 F.3d at 130.

In resolving cases under *Williamson County* ripeness rules, like *Pullman* abstention cases, the federal courts must preserve "the primacy of the federal judiciary in deciding questions of federal law." *England*, 375 U.S. at 415-416. Indeed, the primacy of the federal judiciary is even more compelling under *Williamson County*. While *Williamson County*'s ripeness requirement is mandated by the Fifth Amendment, *Pullman* abstention is merely a "judge-fashioned

vehicle" that allows the state courts to decide state law issues first and thereby potentially avoid the adjudication of federal constitutional issues. *England*, 375 U.S. at 415; *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500-501 (1941) (abstention is based on sound discretion of court of equity).

In sum, the Ninth Circuit's decision was not caused by any ambiguity in the *Williamson County* decision itself. *DLX, Inc. v. Kentucky*, 381 F.3d 511, 523 n. 9 (6th Cir. 2004) (the Ninth's Circuit's rule is "a result clearly not contemplated by the Court in *Williamson County*"); See also *Wilkinson v. Pitkin County Bd. of County Commissioners*, 142 F.3d 1319, 1325 n. 4 (10th Cir. 1998) ("It is difficult to reconcile the ripeness requirement of *Williamson* with the laws of res judicata and collateral estoppel."). This Court should now make clear to the lower federal courts that federal takings claims are not consigned to the state courts, and must be decided on the merits once the ripeness requirements are satisfied.

II. THE NINTH CIRCUIT'S DECISION CREATES A TRAP THAT PRECLUDES ALL FEDERAL COURTS FROM REVIEWING THE MERITS OF FEDERAL TAKINGS CLAIMS

The practical effect of the Ninth Circuit's rule on issue preclusion, when combined with the ripeness requirement of *Williamson County* is that federal takings claims can never be considered on the merits in any federal court, including this Court.

In this case, for example, the Field Brothers could not have filed a petition for certiorari to review the California Supreme Court decision because that court did not decide any

federal question. *San Remo II*, Pet. App. 107a, n. 1.[2] Indeed, the California courts could not have decided the federal takings claims because those claims are subject to the same ripeness requirements when brought in state court as they are in federal court. *Breneric Associates v. City of Del Mar*, 69 Cal.App.4th 166, 188-189, 81 Cal.Rptr.2d 324, 338-339 (1998) (*Williamson County* ripeness requirement applies in state courts); see also *Santini*, 342 F.3d at 126-127, discussing *Melillo v. City of New Haven*, 249 Conn. 138, 154, 732 A.2d 133, 143 n. 28 (1999) (Connecticut applies same rule as *Breneric*).

The Ninth Circuit's barrier to federal court consideration of Fifth Amendment claims is indefensible. Under the Ninth Circuit's rule, the Fifth Amendment's protection of property rights is relegated to the "status of a poor relation" of the other rights secured by the Bill of Rights. Cf. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

Indeed, one commentator has dubbed this combination of ripeness and issue preclusion, "The *Williamson* Trap".

---

[2] All seven justices of the California Supreme Court stated that they expected that the Field Brothers would obtain a ruling on the merits of their federal claims in this federal court action. The majority stated that the Field Brothers "explicitly reserved their federal causes of action" and that because the Field Brothers relied "solely on state law, no federal question has been presented or decided in this case." *San Remo II*, Pet. App. 107a, n. 1. Both dissents made the same point. *San Remo II*, Pet. App. 170a (Baxter and Chin, dissenting: "Plaintiffs have reserved their federal claims and, if rebuffed here, will resume their federal litigation"); Pet. App. 194a (Brown, dissenting: "I dissent and hope the plaintiffs find a more receptive forum in the federal courts.").

Meacham, Madeline J., *The Williamson Trap*, 32 Urb. Law. 239 (2000). Moreover, this is not just a trap for the unwary, it is a "procedural snare that swallows the careful takings claimant as well as the unwary". Breemer, J. David, *Overcoming Williamson County's Troubling State Procedures Rule*, 18 J. Land Use & Envtl. L. 209, 240, 242 (2003) ("following *Williamson County*, many federal courts have converted the state procedures rule into a permanent jurisdictional bar by applying state rules of claim and issue preclusion."). As explained by Professor Mandelker: "federal judges have distorted the Supreme Court's ripeness precedents to achieve an undeserved and unwarranted result: they avoid the vast majority of takings cases on their merits." Testimony of Daniel Mandelker on H.R. 1534 Before the House Judiciary Committee, 31 Urb. Law. 232, 236 (1999).

Many other commentators have considered the lower court decisions applying *Williamson County* ripeness together with claim and issue preclusion and described the result as "worse than mere chaos," "inherently nonsensical," "shocking," "absurd," "unjust," "pernicious,", "riddled with obfuscation and inconsistency," and "a Kafkaesque maze." Berger, Michael and Kanner, Gideon, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671, 702-703 (2004) (citations omitted). Berger and Kanner note that some of these commentators "are avowedly government-oriented in their views." *Id.* at 703. Even a commentator who believes that all federal takings claims should be forced into the state courts has described the situation as "a fraud or hoax on landowners." Roberts, Thomas, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 71 (1995).

In sum, the Ninth Circuit's rule effectively precludes consideration of the merits of federal takings claims in both state and federal court and leaves plaintiffs with nothing but state compensation claims in the state courts – and no opportunity at all for this Court to review the merits. The Ninth Circuit's rule cannot be squared with this Court's rationales in *Williamson County* and *England*; therefore, this Court should reverse the Ninth Circuit's decision and adopt the Second Circuit's holding in *Santini*.

III. CONTRARY TO THE CITY'S ARGUMENTS, THE NINTH CIRCUIT'S RULE IS NOT REQUIRED BY THE FULL FAITH AND CREDIT ACT

The City's only argument against the holding in *Santini* is that the Ninth Circuit's rule is compelled by the Full Faith and Credit Act, 28 U.S.C. § 1738. Respondent's Brief in Opposition ("Br. in Opp.") 13-18. That argument has no merit: The Second Circuit's holding in *Santini*, like this Court's holding in *England*, is fully consistent with the Full Faith and Credit Act.

The City's argument relies primarily on this Court's decisions in *Allen* and *Migra* interpreting the Full Faith and Credit Act. Br. in Opp. 13-14, 16. But, those decisions do not compel issue preclusion in this case; they only hold that there is no blanket exemption from issue and claim preclusion for suits brought under § 1983. *Allen v. McCurry*, 449 U.S. 90, 96-105 (1980) (issue preclusion); *Migra v. Warren City School District Board*, 465 U.S. 75, 83-85 (1984) (claim preclusion).

Indeed, this Court has already rejected the City's argument. *Allen* and *Migra* do not alter the res judicata

analysis here. In both opinions, this Court noted that federal law creates a number of exceptions to res judicata and discussed the exception created by *England*. *Migra*, 465 U.S. at 81 (federal law can modify the operation of § 1738) and 85 n. 7 (acknowledging exception created by *England*); *Allen*, 449 U.S. at 101 n. 17 (*England* exception not affected by Court's holding); accord *Haring v. Prosise*, 462 U.S. 306, 313-314 (1983) (recognizing various federal law exceptions to res judicata for state court judgments). As this Court stressed, the decisions in *Allen* and *Migra* have no effect on any exception to federal res judicata rules. *Allen*, at 95 n. 7 ("It must be emphasized that the question whether any exceptions or qualifications within the bounds of that doctrine might ultimately defeat a collateral estoppel defense in this case is not before us."); *Migra*, 465 U.S. at 85-87 (remanding to district court to determine whether Ohio claim preclusion barred that case).

Moreover, the City does not even begin to explain why there is an exception to the Full Faith and Credit Act for claim preclusion, but there should be no exception for issue preclusion. In this case, the City has consistently admitted that there is no claim preclusion. *San Remo III*, Pet. App. 12-a-13a; See also *DLX, Inc. v. Kentucky*, 381 F.3d 511, 521-523 (6th Cir. 2004) (every Circuit to decide issue has concluded that there is no claim preclusion because of *Williamson County*). The City has never offered any good reason to apply issue preclusion (but not claim preclusion) to federal takings claims. Of course, there is nothing in the Full Faith and Credit Act that would justify treating claim and issue preclusion differently. This Court made precisely that point in *Migra*:

> It is difficult to see how the policy concerns underlying § 1983 would justify a distinction between the issue preclusive and claim preclusive effects of state-court judgments.
>
> . . . . .
>
> If § 1983 created an exception to the general preclusive effect accorded to state-court judgments, such an exception would seem to require similar treatment of both issue and claim preclusion.

Migra, 465 U.S. at 83-84. If, as the City admits, and every Circuit to consider the issue has held, there is no claim preclusion in this circumstance, then there is also no reason to apply issue preclusion.

In sum, there is nothing in the Full Faith and Credit Act that supports the City's argument that issue preclusion should apply here even though claim preclusion does not.

IV. EVEN IF THIS COURT AGREES THAT ISSUE PRECLUSION SHOULD APPLY IN SOME TAKINGS CASES, THE NINTH CIRCUIT ERRED BY APPLYING ISSUE PRECLUSION IN THIS CASE

While the Ninth Circuit did discuss some California cases on issue preclusion, the Ninth Circuit held that issue preclusion applies if the state's compensation law is "equivalent" to the federal law of takings. *San Remo III*, Pet. App. 16a, citing *Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995) ("*Dodd I*"); *Dodd v. Hood River County*, 136 F.3d 1219, 1225 (9th Cir. 1998) ("*Dodd II*"). In this case, the Ninth Circuit held that the Field Brothers' federal takings claims were barred because "the determination of the state takings claims was 'an equivalent determination' of the federal takings claims." *San Remo III*, Pet. App. 17a ("as required by *Dodd I*").

The Ninth Circuit's reliance on *Dodd I* and *Dodd II* was misplaced. Even if state law of issue preclusion were relevant in this case, the Ninth Circuit was required to give the California state court judgment the same preclusive effect as the state courts. *Allen*, 449 U.S. at 96. But, *Dodd I* and *Dodd II* could not have applied California law because the judgment at issue in *Dodd* was an Oregon judgment. And, both opinions state that they applied Oregon's law of issue preclusion. *Dodd I*, 59 F.3d at 861, *Dodd II*, 136 F.3d at 1225. Thus, even if *Dodd I* and *Dodd II* correctly applied the "equivalent determination" test, that test was based on Oregon law.[3]

California issue preclusion law, however, does not have an "equivalent determination" test. Instead, under California law, a judgment based on one body of law can never be given preclusive effect in a case governed by a different body of law. *American Continental Ins. Co. v. American Cas. Co.*, 86 Cal.App.4th 929, 103 Cal.Rptr.2d 632 (2001). The California Court of Appeal held that a decision under Arizona law (on identical facts between the same parties) was not binding in an action governed by California law:

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[3] In fact, the Ninth Circuit's opinions in *Dodd I* and *Dodd II* do not cite any Oregon case to support the "equivalent determination" test. In *Dodd I*, the Ninth Circuit cited no Oregon cases at all with respect to issue preclusion, instead citing solely to this Court's opinion in *Allen*. *Dodd I*, 59 F.3d at 863. In *Dodd II*, the Ninth Circuit never stated that the test was "equivalent determination". By making that the test, the Ninth Circuit effectively created its own federal common law of issue preclusion. Of course, that is completely improper under this Court's decisions. E.g., *Migra*, 465 U.S. at 87 (remanding with instructions to apply state law because it appeared that the district court may have applied federal law).

> [Plaintiff's collateral estoppel] argument fails because it has not established that the "same issue" was actually litigated and resolved in the prior litigation. The Arizona court reached its decision under Arizona law while we are asked to decide this case under California law.

American Continental, 86 Cal.App.4th at 945, 103 Cal.Rptr.2d at 643. Similarly, in this case, the state court decision denying compensation was based on California law, while this case is based on federal law. Just as a decision of the Arizona courts cannot dictate the result under California law, a decision by the California courts cannot dictate the result under federal constitutional law.[4]

Therefore, even if this Court rejects the Second Circuit's holding in *Santini*, the Ninth Circuit's decision is erroneous. Under California law, the state court judgment under state compensation law does not preclude the Field Brothers' federal action under the Fifth Amendment.

---

[4] None of the California Supreme Court justices in this case believed that the court's ruling under state law would preclude the Field Brothers' federal claims. The majority stated that the Field Brothers "explicitly reserved their federal causes of action" and that because the Field Brothers relied "solely on state law, no federal question has been presented or decided in this case." *San Remo II*, Pet. App. 107a, n. 1. Both dissents made the same point. *San Remo II*, Pet. App. 170a (Baxter and Chin, dissenting: "Plaintiffs have reserved their federal claims and, if rebuffed here, will resume their federal litigation"); Pet. App. 194a (Brown, dissenting: "I dissent and hope the plaintiffs find a more receptive forum in the federal courts.").

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Courts of Appeals should be reversed.

Dated: January 24, 2005.

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No. 04-340

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IN THE

Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T & R INVESTMENTS CORP.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

This Court limited review to the following question:

Is a Fifth Amendment takings claim barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal takings claim?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	3
SUMMARY OF ARGUMENT	13
ARGUMENT	16
I. THE FULL FAITH AND CREDIT ACT BARS RELITIGATION OF ISSUES PREVIOUSLY RESOLVED BY THE STATE COURTS	16
A. The Act Requires The Federal Courts To Give Issue-Preclusive Effect To The California Judgment In This Case	16
B. Petitioners Do Not Come Within Any Recognized Exception To The Full Faith And Credit Act	19
II. THERE IS NO BASIS FOR CREATING AN EXCEPTION TO THE FFCA IN THIS CASE	23
A. *Williamson County* Does Not Require An Exception	23
B. There Is No Justification For Refusing To Respect State Judgments In This Context	30
CONCLUSION	34

TABLE OF AUTHORITIES

CASES

Page(s)

ASARCO, Inc. v. *Kadish*, 490 U.S. 605 (1989) 25
Allen v. *McCurry*, 449 U.S. 90 (1980) ..... *passim*
American Continental Insurance Co. v. *American Casualty Co.*, 86 Cal. App. 4th 929, 103 Cal. Rptr. 2d 632 (2001) 18
Bennett v. *Spear*, 520 U.S. 154 (1997) 29
Breneric Associates v. *City of Del Mar*, 69 Cal. App. 4th 166, 81 Cal. Rptr. 2d 324 (1998) 26
Brown v. *Felsen*, 442 U.S. 127 (1979) 26
Bruley v. *City of Birmingham*, 675 N.W.2d 910 (Mich. Ct. App. 2003), *appeal dismissed*, 679 N.W.2d 66 (Mich. 2004) 25
Calhoun v. *Franchise Tax Board*, 20 Cal. 3d 881, 574 P.2d 763 (1978) 18
City of Monterey v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) 24
Clajon Production Corp. v. *Petera*, 70 F.3d 1566 (10th Cir. 1995) 25
Commercial Builders v. *Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992) 13
Daniels v. *Area Plan Commission*, 306 F.3d 445 (7th Cir. 2002) 25
Del Monte Dunes at Monterey, Ltd. v. *City of Monterey*, 920 F.2d 1496 (9th Cir. 1990) 25
Delaware v. *Prouse*, 440 U.S. 648 (1979) 26
Department of Taxation & Finance v. *Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) 19
District of Columbia Court of Appeals v. *Feldman*, 460 U.S. 462 (1983) 28
Dodd v. *Hood River County*, 136 F.3d 1219 (9th Cir. 1998) 27
Dolan v. *City of Tigard*, 512 U.S. 374 (1994) 9
England v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) 14, 19, 21, 22, 23
FERC v. *Mississippi*, 456 U.S. 742 (1982) 30

TABLE OF AUTHORITIES—Continued

Page(s)

Fair Assessment in Real Estate Ass'n, Inc. v. *McNary*, 454 U.S. 100 (1981) 28
Federated Department Stores, Inc. v. *Moitie*, 452 U.S. 394 (1981) 16
First English Evangelical Lutheran Church v. *County of Los Angeles*, 482 U.S. 304 (1987) 25
Galbraith v. *Planning Department*, 627 N.E.2d 850 (Ind. Ct. App. 1994) 27
Guetersloh v. *State*, 930 S.W.2d 284 (Tex. App. 1996) 25
Hall v. *City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986) 27
Haring v. *Prosise*, 462 U.S. 306 (1983) 18, 20
Harlen Associates v. *Incorporated Village of Mineola*, 273 F.3d 494 (2d Cir. 2001) 30
Hill v. *City of Manhattan Beach*, 6 Cal. 3d 279, 491 P.2d 369 (1971) 6
Idaho v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) 32
Kremer v. *Chemical Construction Corp.*, 456 U.S. 461 (1982) 17, 19, 20, 32
Lumpkin v. *Jordan*, 49 Cal. App. 4th 1223, 57 Cal. Rptr. 2d 303 (1996) 18
MC Associates v. *Town of Cape Elizabeth*, 773 A.2d 439 (Me. 2001) 25
Marrese v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985) 17, 19
Matsushita Electric Industrial Co. v. *Epstein*, 516 U.S. 367 (1996) 17, 20
Migra v. *Warren City School District Board of Education*, 465 U.S. 75 (1984) 20, 22, 28, 32
New Orleans Public Service, Inc. v. *Council of City of New Orleans*, 491 U.S. 350 (1989) 28
Nollan v. *California Coastal Commission*, 483 U.S. 825 (1987) 9
Ohio v. *Reiner*, 532 U.S. 17 (2001) 26

TABLE OF AUTHORITIES—Continued

Page(s)

Parsons Steel, Inc. v. *First Alabama Bank*, 474 U.S. 518 (1986) 17, 19
Penn Central Transport Co. v. *New York City*, 438 U.S. 104 (1978) 11
Pennsylvania v. *Muniz*, 496 U.S. 582 (1990) 26
Railroad Commission v. *Pullman Co.*, 312 U.S. 496 (1941) 8
Rooker v. *Fidelity Trust Co.*, 263 U.S. 413 (1923) 28
San Remo Hotel L.P. v. *City & County of San Francisco*, 100 Cal. Rptr. 2d 1 (Cal. Ct. App. 2000). 9
San Remo Hotel v. *City & County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998) 7
Sierra Lake Reserve v. *City of Rocklin*, 938 F.2d 951 (9th Cir. 1991), *vacated*, 506 U.S. 802 (1992) 27
South Dakota v. *Neville*, 459 U.S. 553 (1983) 26
Stone v. *Powell*, 428 U.S. 465 (1976) 32
Stolz v. *Bank of America*, 15 Cal. App. 4th 217, 19 Cal. Rptr. 2d 19 (1993) 18
University of Tennessee v. *Elliott*, 478 U.S. 788 (1986) 16
Williamson County Regional Planning Commission v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) 2, 7, 24, 25
Yee v. *City of Escondido*, 224 Cal. App. 3d 1349, 274 Cal. Rptr. 551 (1990), *aff'd*, 503 U.S. 519 (1992) 27
Yee v. *City of Escondido*, 503 U.S. 519 (1992) 18, 19, 24, 27
Zacchini v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) 26

STATUTES AND RULES

28 U.S.C. § 1257 25
Full Faith and Credit Act
28 U.S.C. § 1738 ..... *passim*
42 U.S.C. § 1983 20

TABLE OF AUTHORITIES—Continued

Page(s)

S.F. Admin. Code
§ 41.3 3
§ 41.4 3
§ 41.6 3
§§ 41.12-41.13 ..... 3, 4
§ 41.19 3
S.F. Planning Code
§§ 722.1 *et seq.* 4
§ 722.55 4
S. Ct. R. 14.1(a) 18, 19

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Page(s)

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§ 4469 17
§ 4471.1 21
§ 4471.2 20

IN THE

Supreme Court of the United States

No. 04-340

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T & R INVESTMENTS CORP.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

This case involves a takings challenge to a San Francisco ordinance that protects the stock of affordable housing available to city residents—particularly the elderly, the disabled, and those with low incomes—by regulating the conversion of hotel rooms from residential to tourist use. The state courts considered and rejected petitioners' takings claims under state law, applying standards identical to those of federal law. Petitioners now seek the right to relitigate every issue underlying the identical federal claims in federal court, as if the state proceedings had never occurred.

Petitioners' themes are unfairness and delay. There is, however, no unfairness in holding petitioners bound by the

state courts' resolution of issues common to their state and federal claims. Doing so merely applies a basic principle of preclusion—embodied in California law, and binding on the federal courts under the Full Faith and Credit Act, 28 U.S.C. § 1738. As to delay, the federal courts could have resolved petitioners' central claim—their facial challenge to the hotel ordinance on the ground that it does not "substantially advance" legitimate goals—when petitioners first brought it. In petitioners' first federal proceeding the district court dismissed that claim as time-barred—not because any state proceeding was "required to ripen" it (Pet. Br. i). It was petitioners who snatched delay from the jaws of defeat on that claim by persuading the court of appeals to order abstention—in favor of a state administrative mandamus proceeding that they had allowed to languish for the previous five years. Likewise, with respect to petitioners' compensation-seeking claims, it is petitioners who chose to spend five years pursuing relief in the federal courts when, under *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), they were plainly required to proceed first in state court. Having unsuccessfully presented the state versions of all their takings claims, including the facial claim, to the California courts, petitioners have now returned to the federal courts seeking to press the parallel federal claims once again. They can hardly complain about unfair delay.

To the contrary, it is the courts whose patience should be wearing thin. The current proceedings are petitioners' third iteration of essentially identical takings claims. Issue preclusion, and the FFCA, are designed to prevent exactly this sort of abuse. In the end, petitioners' argument for relitigation of the issues underlying their takings claims rests less on any "promise[]" (Pet. Br. 7) made by this Court in *Williamson County* than on petitioners' evident distrust of the state courts. Yet both Congress and this Court have made very clear that state courts' determinations are entitled to full respect. Terminating this litigation risks no unfairness to petitioners. Prolonging it would be inconsistent with the Full Faith and Credit Act and with its underlying

principles of comity and federalism, and would impose unwarranted burdens on state and local governments and the federal courts.

STATEMENT

1. a. In the late 1970s, San Francisco's Board of Supervisors concluded that a progressive loss of residential hotel rooms was contributing to "a severe shortage of decent, safe, sanitary and affordable rental housing in the City." *See* Pet. App. 195a-197a (S.F. Admin. Code § 41.3). Because "[m]any of the [City's] elderly, disabled and low-income persons and households reside in residential hotel units," this trend posed a particular threat to "those persons who are least able to cope with displacement in San Francisco's housing market." *Id.* at 196a-197a (§ 41.3(c), (h)). In 1979, the Board instituted a moratorium on the demolition or conversion of residential hotel units, and in 1981, it enacted a Residential Hotel Unit Conversion and Demolition Ordinance (HCO). *See id.* at 5a, 196a-197a.

The HCO required each hotel in San Francisco to report the number of residential and tourist units in the hotel as of September 23, 1979. Pet. App. 203a, 205a-209a (§§ 41.4(q), (s), 41.6). The City would then issue a certificate of use, designating the hotel's baseline number of residential and tourist units. *Id.* at 207a (§ 41.6(d)). The HCO permits unlimited tourist use of rooms designated as tourist units. Under certain conditions, rooms designated as residential units may also be used as tourist rooms during the summer tourist season (May through September). Residential units must be returned to residential use during the winter, when demand for tourist rooms declines. *Id.* at 236a (§ 41.19(a)(3)).

An owner may convert historically residential units to permanent tourist use if the owner elects either to arrange for the construction or rehabilitation of replacement units, or to pay into the City's Residential Hotel Preservation Fund an in-lieu fee equal to a defined portion of the cost to replace the converted units. *See* Pet. App. 224a-230a (§§ 41.12-41.13). The City's Department of Building Inspection, which

administers the HCO, has no discretion to vary the amount of replacement housing required or the amount of the in-lieu payment. *See id.* at 137a-138a.[1]

b. The City's Planning Code also separately restricts changes in the use of residential property in some districts. Pet. App. 6a. The North Beach Neighborhood Commercial District zoning ordinance, S.F. Planning Code §§ 722.1 *et seq.*, requires property owners who seek to establish a new permanent tourist hotel use to first secure a conditional use permit from the City's Planning Commission. *Id.* § 722.55.

2. Petitioners are the San Remo Hotel, a 62-room hotel located in North Beach, and its owners. *See* JA 71-72. In 1981, when the HCO first went into effect, petitioners' agent submitted an Initial Unit Usage Report stating that all of the San Remo's rooms were in residential use on September 23, 1979. Pet. App. 7a; JA 78-79. Based on petitioners' own report, the City confirmed the number of residential units in an HCO certificate of use. JA 78-79. Petitioners did not challenge the City's classification under the procedures provided by the HCO, and the certificate of use became final. *See id.*; Pet. App. 7a; *id.* at 208a-209a (HCO § 41.6(f)-(g) (procedures for appealing initial unit status determination)).[2]

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[1] In 1990, the City revised and reenacted the HCO. Among other changes, the revision increased the construction cost component of the in-lieu fee from 40% to 80%, but exempted owners (such as petitioners) who applied for conversion permits before the revised ordinance took effect. *See* Pet. App. 6a, 110a n.3; *id.* at 227a-230a (§ 41.13(a)(4), (d)).

[2] Petitioners allege that the HCO interfered with the historic use of the San Remo as a tourist hotel. *See* Pet. Br. 3-4. They maintain that the hotel operator who filled out the HCO use report on their behalf mistakenly over-reported the number of rooms in residential use on the HCO's baseline date. *See id.* at 3; JA 78-79. There is reason to question the degree of any misstatement. *See* Pet. App. 114a-116a (describing state administrative record); J. Schimmel, *San Remo Hotel 1906-1976, Historical Resource Manual* 5-16 (1998) (indicating that before 1979 the San Remo was used primarily, if not exclusively, as a residential hotel). In any event, as the state and lower federal courts recognized, the HCO certificate of use was reasonably based on self-reporting by petitioners or their agents, and it became legally final when petitioners failed to invoke the procedures provided for making any correction. Pet. App. 7a, 56a-57a, 152a-153a. As petitioners stressed in their reply at the petition stage (at pp. 9-10), in this Court "the relevant facts are undisputed or are a matter of public record." The undisputed, public-record fact is that for purposes of the HCO and related ordinances, the historical use of all the San Remo's rooms is legally established by the HCO certificate of use.

In May 1990, petitioners applied for a permit under the HCO to convert all of the San Remo's residential units to permanent tourist use. Pet. App. 7a. Because petitioners chose not to offset the conversion by creating or renovating comparable units elsewhere, the HCO required them to pay into the City's housing fund an in-lieu fee for 62 replacement units—a total of $567,000, based on two independent appraisals. *See id.* at 110a, 118a, 227a.

Independently, the North Beach zoning ordinance required petitioners to obtain a conditional use permit before establishing a new tourist use. Pet. App. 7a-9a, 59a. Petitioners challenged the applicability of that requirement, but in December 1992 the City's Board of Permit Appeals (BPA) rejected their objection. *Id.* at 8a, 60a. In January 1993, the Planning Commission approved petitioners' conditional use permit subject to certain conditions, including compliance with the HCO through payment of the in-lieu fee. *Id.* at 60a-61a.[3]

In March 1993, petitioners filed a petition for administrative mandamus in California Superior Court, challenging the BPA's requirement that they obtain a conditional use permit under the Planning Code. *See* Pet. App. 9a. Petitioners based their challenge on California law allowing the

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[3] As the California Supreme Court recognized, the Planning Commission's decision imposed no fee of its own; it merely required petitioners to comply with the HCO, as petitioners had represented that they would. Pet. App. 129a. Petitioners began operating the San Remo as a permanent tourist hotel in September 1993 when the federal district court enjoined the City's enforcement of the HCO. *See* p. 6 n.5, *infra*. In December 1996, after the district court dissolved that injunction, petitioners paid the HCO fee under protest. JA 85. In March 1997, the City issued a conversion permit under the HCO. JA 86.

continuation of nonconforming uses under certain circumstances.[4]

3. a. *San Remo I.* In May 1993, rather than bringing takings claims in state court or pursuing their mandamus action—which they allowed to lie dormant until 1998—petitioners filed this lawsuit in federal court.[5]

Petitioners' complaint (as with subsequent complaints described below) advanced several theories for relief. *See* JA 88-94 (federal complaint), 98-123 (state complaint). The courts below distinguished principally between petitioners' facial and as-applied claims. *See, e.g.*, Pet. Br. 5; Pet. App. 9a-11a, 35a, 144a, 152a. In its first review of the case, the court of appeals also distinguished between petitioners' claims or theories that sought compensation for the economic impact of a taking ("economic impact" claims)—for instance, "that the HCO deprived [petitioners] of the economically viable use of [their] hotel"—and those claims that instead sought a declaration that the HCO is invalid, on its face or as applied, because it "does not substantially advance

[4] A legal nonconforming use under California law is "a lawful use existing on the effective date of the zoning restriction and continuing since that time in nonconformance to the ordinance." *Hill* v. *City of Manhattan Beach*, 6 Cal. 3d 279, 285, 491 P.2d 369, 373 (1971) (internal quotation marks omitted).

[5] In filing their suit, petitioners designated it as "related" to a case brought by other hotel owners challenging the constitutionality of the HCO. Pet. App. 61a. That case was pending before district judge John Vukasin, who had already publicly indicated that he thought the HCO was invalid. In September 1993, Judge Vukasin declared the HCO facially unconstitutional in the related case, and then granted petitioners' request for a preliminary injunction. *See id.* at 62a. Soon thereafter Judge Vukasin died, and the case was reassigned. *See id.* After further proceedings in both cases (during which the court of appeals vacated Judge Vukasin's declaration and remanded for consideration of the statute of limitations), the district court ruled for the City, as described in the text. *See id.* at 63a, 66a.

legitimate state interests" ("substantially advance" claims). App. 8a-10a.[6] We draw those same distinctions here.

Petitioners' core argument in their first federal litigation was, as it is now, that the HCO "fail[s] to substantially advance legitimate government interests" because it unfairly "force[s] [petitioners] to bear the public burden of housing the poor[.]" JA 89 (third amended complaint); *see, e.g.*, JA 92; App. 8a; *compare* Pet. Cert. Reply Br. 10. That "substantially advance" claim is primarily facial (although petitioners have also stated it in as-applied terms) and, if successful, would justify the invalidation of the ordinance, rather than payment of just compensation for its application. *See* Pet. App. 80a-83a. In addition, petitioners alleged that the HCO, in conjunction with the North Beach zoning ordinance, deprived them of all or an impermissible portion of the value of their property, without providing for just compensation. *See* JA 87, 93; App. 6a. Those "economic impact" claims are essentially as-applied (although they can be stated in facial terms). At least in theory, if successful, they would lead to an order that the City compensate petitioners for the value of the property "taken." *See, e.g.*, App. 8a-9a.

The district court held that any facial takings claim arose when the HCO was enacted and was therefore barred by the statute of limitations. August 26, 1996 Order at 11-15, JA 24 (#126); *see* Pet. App. 66a. The court further held that any as-applied takings claim was "unripe for federal review" under *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), because petitioners had not sought compensation through available state procedures. August 26, 1996 Order at 18; *see id.* at 15-18; Pet. App. 66a.

The court of appeals affirmed in part. The court agreed that, under *Williamson County*, any "economic impact" claim was "unripe until the owner has sought, and been de-

[6] The court of appeals' first decision—in *San Remo Hotel* v. *City & County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998)—is included as an appendix to this brief.

nied, just compensation by the state." App. 8a (facial claims); App. 10a (as-applied claims). On the other hand, the court recognized that, because the remedy for a successful facial "substantially advance" claim is not an award of just compensation but rather invalidation of the regulation, petitioners' claim that the HCO "is a facial taking because it is not sufficiently related to legitimate state interests . . . [was] ripe." App. 10a. The court therefore could have affirmed the district court's holding that that claim was barred by the statute of limitations, and brought at least a substantial portion of this litigation to an end.

On appeal, however, petitioners for the first time invoked *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). *See* App. 7a-8a, 14a-17a. They argued that the federal courts should abstain from deciding any of their federal takings claims, because their administrative mandamus challenge to the conditional use permit requirement—which they had failed to prosecute in the five years since its filing—might "moot the issue of whether the [HCO] is a facial or an as-applied taking under the Fifth Amendment[.]" JA 68 (petitioners' brief); *see* JA 50-68 (same); App. 16a. The court recognized the irony in petitioners' request for abstention, given that they had sought federal jurisdiction in the first place. The court also noted the possibility that petitioners, whose facial claim had been dismissed with prejudice as untimely, were seeking a "tactical advantage[]" through their belated argument for abstention. App. 15a. The court nonetheless accepted petitioners' representation that the state administrative mandamus proceedings might moot or narrow their facial "substantially advance" claim and thus remanded with instructions that the district court abstain on that claim. App. 16a-17a.[7]

b. *San Remo II.* Upon return to state court, petitioners amended their petition for administrative mandamus to add

[7] It is unclear how, if at all, the court of appeals addressed the as-applied "substantially advance" claim.

a full range of taking claims under the California Constitution. Pet. App. 67a; JA 103-123. These included not only some "economic impact" claims, but also—indeed, principally—"substantially advance" claims, predicated on the theory that the HCO and zoning requirements force "[petitioners] and other similarly situated property owners" to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole." JA 103-104; *see, e.g., id.* at 106 (fee imposed "not roughly proportional" to impact of petitioners' use on government interest), 107, 119-120, 120-121 (no "close nexus" between fee and public harm). As finally amended, the state petition and complaint also briefly set out, but purported to "reserve[]," an "as applied" federal takings claim. JA 125 (capitalization altered); *see* Pet. App. 67a-68a.

The superior court rejected petitioners' administrative mandamus challenge to the application of the North Beach zoning ordinance. *See San Remo Hotel L.P.* v. *City & County of San Francisco*, 100 Cal. Rptr. 2d 1, 8 (Cal. Ct. App. 2000) (describing trial court's determination). The court also sustained a demurrer to petitioners' facial takings challenge to the HCO, concluding that even if the facts they pleaded were true, the law would not support petitioners' claim. *Id.* at 7-8. The court reasoned that, as a general legislative regulation, the HCO was not subject to the heightened scrutiny established by this Court for certain federal takings claims in *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 834 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994). *See* Pet. App. 119a. The court rejected any "as applied" claims on waiver grounds. *Id.*; 100 Cal. Rptr. 2d at 8.

The state court of appeal reversed. 100 Cal. Rptr. 2d at 4. With respect to the administrative mandamus challenge, it held that the trial court should make factual findings about the actual use of the San Remo's rooms before enactment of the North Beach zoning ordinance. *Id.* at 16-19. As to the takings claims, the court concluded that petitioners' "substantially advance" challenge to the HCO should be evalu-

ated under the heightened scrutiny of *Nollan* and *Dolan*, and that the takings issues should be remanded for further proceedings. *Id.* at 9-16.

In March 2002, the California Supreme Court reversed. Pet. App. 106a-194a.[8] On the mandamus issue, the court upheld application of the conditional use permit requirement, regardless of the actual proportions of tourist and residential use at the hotel before the North Beach zoning ordinance took effect. *Id.* at 122a-130a. On the takings issues, the court noted that it was not deciding any federal claim. *Id.* at 107a n.1. It explained, however, that because California and federal takings law are largely coextensive, it would "analyze [petitioners'] takings claim under the relevant decisions of both this court and the United States Supreme Court." *Id.* at 130a-131a.

Like the state court of appeal, the Supreme Court recognized that petitioners' arguments turned on the "substantially advance" strain of takings analysis. Pet. App. 131a, 144a & n.14.[9] The court held that petitioners' claim was not subject to the *Nollan/Dolan* heightened standard of review. *See id.* at 131a-144a. The court then carefully considered and rejected petitioners' various arguments that the HCO does not substantially advance legitimate government interests. *See id.* at 144a-155a. It concluded, for example, that the HCO's "housing replacement fees bear a reasonable relationship to loss of housing" (*id.* at 144a); that "the use of a defined historical measurement point is reasonably related to the HCO's housing preservation goals" (*id.* at 145a); that "[t]he HCO was clearly not designed as a means of raising general revenue" (*id.* at 147a); and that "[m]aintaining the

[8] Justices Baxter and Chin concurred in part and dissented in part. Pet. App. 155a-174a. Justice Brown dissented. *Id.* at 175a-194a.

[9] Responding to Justice Baxter's separate opinion, the court specifically held that the scope of its analysis reflected "choices [petitioners] ha[d] made in refining their claims as they climbed the appellate ladder"—including failing to press any compensation-seeking, economic-impact claim. *Compare* Pet. App. 144a n.14 *with id.* at 172a-173a (Baxter, J., concurring and dissenting).

availability of residential hotel rooms is a reasonable means of serving one segment of San Franciscans' housing needs" (*id.*). It also rejected the arguments that the HCO "targets an arbitrary small group of property owners," or "deprives all the burdened properties of so much of their value, without any corresponding benefit, as to constitute a taking on its face." *Id.* at 150a. It noted that the HCO on its face "allows the property owner to continue the property's preordinance use unhindered," and therefore "'does not interfere with what must be regarded as [the property owner's] primary expectation concerning the use of the parcel.'" *Id.* (quoting *Penn Central Transport Co.* v. *New York City*, 438 U.S. 104, 136 (1978)).

The court specifically considered and rejected petitioners' claims not only as a facial matter, but also in the context of their particular factual allegations. Pet. App. 152a-155a. It held, for example, that the designation of all the San Remo's rooms as residential "was reasonably based on the hotel management's own report of the rooms' use on the HCO's initial status date" (*id.* at 152a & n.17); that the HCO's method of determining the in-lieu housing replacement fee was reasonable "even if no current resident were required to move" (*id.* at 153a-154a); and that because the converted residential housing had not been previously abandoned or demolished, a mitigation fee measured by the units lost was "reasonably related to the impacts of [petitioners'] proposed change in use." *Id.* at 155a.

c. *San Remo III.* In June 2002, petitioners returned to federal court and amended their complaint to seek *de novo* relitigation of common issues raised by their state and federal takings claims. *See* Pet. App. 68a-69a. While the amended complaint invokes multiple theories, petitioners only pressed their "substantially advance" claim—the same claim they eventually sought to raise on the merits in their petition to this Court. *Compare, e.g.*, JA 31 (#167) *with* Pet. 10-18 (seeking review of court of appeals' conclusion that "there is no heightened scrutiny [under *Nollan* and *Dolan*] for exactions imposed by legislation"). As the district court

emphasized, petitioners sought to "argu[e] a violation of the Takings Clause based on the exact same facts and circumstances argued before the state courts." Pet. App. 96a.

In two extensive opinions, the district court first held—as it had in the first federal litigation—that petitioners' "substantially advance" challenges are barred by the statute of limitations. Pet. App. 31a-32a, 72a-85a. In any event, the court held, the Full Faith and Credit Act, 28 U.S.C. § 1738, required it to give issue-preclusive effect to the state court's prior judgment, because "the substantive laws of takings in California and federal courts are coextensive[.]" Pet. App. 86a-87a. After reviewing the California Supreme Court's decision (*id.* at 88a-90a), the district court concluded that the state court "decided the identical issue[s] now pled in the Amended Complaint with respect to the HCO." *Id.* at 90a; *see also id.* at 50a-51a (same as to challenge to application of zoning ordinance). The court rejected petitioners' argument that preclusion should not apply because the California court applied a less stringent standard of scrutiny than the proper federal standard. *Id.* at 91a-94a. Considering the question independently as a matter of federal law, the court agreed with the California Supreme Court's conclusion that *Nollan/Dolan* heightened review "do[es] not apply in this case." *Id.* at 94a; *see also id.* at 44a-48a. Accordingly, the court applied issue preclusion, which in turn had the effect of resolving each of petitioners' federal takings claims. *Id.* at 50a-51a, 104a-105a.[10]

The court of appeals affirmed. Pet. App. 3a-21a. Like the district court, it concluded that petitioners' federal takings claims were "based on the same factual allegations" and legally "identical" to those they had already litigated in state court. *Id.* at 17a. It therefore affirmed judgment for respondents on the basis of the issue preclusion required by the Full Faith and Credit Act. *Id.* at 16a-21a. The court noted that the California Supreme Court construed the state

[10] The district court further indicated that if it had reached the merits it would have agreed with the California Supreme Court. Pet. App. 101a-103a.

and federal takings clauses "congruently" and had "applied 'the relevant decisions of both [the California] court and the United States Supreme Court.'" *Id.* at 17a (quoting *id.* at 130a-131a). Like the district court, the court of appeals also considered and rejected petitioners' argument that California law was in fact *not* "coextensive" with federal law, because federal law would require *Nollan/Dolan* heightened scrutiny. *Id.* at 17a-21a. The court specifically noted that it had "rejected the applicability of *Nollan/Dolan* to monetary exactions such as the ones at issue here." *Id.* at 19a (citing *Commercial Builders* v. *Sacramento*, 941 F.2d 872, 874 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992), for proposition that deferential review applies to generally applicable development impact fee). The court of appeals did not consider the statute of limitations. *Id.* at 11a.

4. In their petition for certiorari, petitioners acknowledged that the court of appeals had "held that the California Supreme Court's refusal to apply heightened scrutiny to legislative exactions under state law is consistent with federal Takings law." Pet. i; *see also* Pet. 10-11. Petitioners sought review of that "refusal" in the second question presented in the petition (Pet. i), but this Court declined to review that question. Instead, the Court granted certiorari solely on the question whether a judgment under state law should have issue-preclusive effect where the state judgment was "rendered in a state court proceeding that was required to ripen the federal Takings claim." Pet. i.

SUMMARY OF ARGUMENT

Petitioners argue that they have been caught in an unfair trap: They were forced to litigate their state takings claim in state court before they could bring a federal claim, but once they had litigated the state claim they found that litigation of issues relevant to their federal claim had been precluded. Petitioners' characterization of the proceedings is misleading, but in any event there is nothing unusual or unfair about the application of issue preclusion in this case.

The Full Faith and Credit Act (FFCA) requires federal courts to give a state judgment the same preclusive effect that it would have in the State's own courts. Here, petitioners litigated their state takings claims through to a final judgment from the state supreme court, which held that th y had failed to state a valid claim. They then presented th same allegations to the federal courts, arguing largely that federal takings law required application of the higher *Nollan/Dolan* standard of scrutiny that the state supreme court had refused to apply under state law. Having considered and rejected that argument on the merits, the federal courts recognized that in every other respect the claims petitioners were pressing turned on issues identical to those already addressed by the state court. Concluding that the California courts would give the state supreme court's judgment issue-preclusive effect, the federal courts properly refused to permit *de novo* relitigation of identical issues in federal court.

This Court has recognized only limited exceptions to the commands of the FFCA, and none of those exceptions applies here. Petitioners rely by analogy on *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), but that case involved whether state proceedings following a federal-court abstention would preclude the later federal litigation of substantially different federal claims, as to which the plaintiff had properly invoked federal jurisdiction in the first instance. That situation differs markedly from the *Williamson County* context contemplated by the question presented, in which a claimant alleging a taking by a state or local government must use available remedies to seek compensation under state law before a claim that the State has denied just compensation in violation of federal law can even arise. Moreover, an *England* reservation of federal *claims* provides no basis for an exception from *issue* preclusion in a case, like this one (but unlike *England* itself), in which the state law issues presented and resolved in the state proceedings are substantially identical to those underlying a federal claim. And if, as petitioners argue, *England* is analogous here because in both instances plaintiffs are required to present certain issues first to the state courts, certainly nothing in *England* suggests that a federal court should deny preclusive effect to the state courts' resolution of *those very issues*.

Petitioners in effect ask the Court to create a new exception to the FFCA based on *Williamson County*. Yet nothing in that case suggests that the Court intended to displace the statutory rules that govern the preclusive effect of state judgments. Where federal takings law differs (or is alleged to differ) materially from state law, the unresolved and distinct federal issues will be open for litigation in any appropriate forum once the limits of state relief are clear and the federal claim has matured under *Williamson County*. Where, however, state law considers the same issues and affords the same rights as federal law, and the state courts have provided an adequate forum for the assertion and testing of those rights, there is no reason to permit relitigation of the very same issues in any subsequent federal proceeding.

Ultimately, petitioners' position is that it is unacceptable to "consign" their compensation claim to state courts. Petitioners cannot, however, argue that the California courts failed to offer them an adequate forum; and any more general argument for refusing to respect state judgments is untenable. State courts are, if anything, better suited than federal courts to hear and resolve constitutional claims involving local land-use issues, and there is no basis for speculation that they are systematically less receptive to takings claims than federal courts. In any event, this Court has soundly rejected inchoate distrust of the state courts as a ground for resisting application of the FFCA. The unusual and unfair result in this case would be to *deny* state judgments preclusive effect, thus condemning local and state governments to bear the enormous burden of relitigating in federal court issues already considered and fairly resolved by the state courts.

ARGUMENT

I. THE FULL FAITH AND CREDIT ACT BARS RELITIGATION OF ISSUES PREVIOUSLY RESOLVED BY THE STATE COURTS

A. The Act Requires The Federal Courts To Give Issue-Preclusive Effect To The California Judgment In This Case

As this Court has long recognized,

> "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." We have stressed that "[the] doctrine [of preclusion] is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . . ."

Federated Dep't Stores, Inc. v. *Moitie*, 452 U.S. 394, 401 (1981) (citations omitted). To these ends, principles of preclusion "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980); *see also, e.g., Univ. of Tenn.* v. *Elliott*, 478 U.S. 788, 798 (1986) (" 'The law of res judicata, much more than most other segments of law, has rhyme, reason, and rhythm—something in common with good poetry. Its inner logic is rather satisfying. It consists entirely of an elaboration of the obvious principle that a controversy should be resolved once, not more than once.' " (quoting 4 K. Davis, Administrative Law Treatise § 21.9, at 78 (2d ed. 1983))).

In addition, rules of preclusion reflect the respect that courts from one system owe to the judgments of those in another. Honoring them "not only reduce[s] unnecessary litigation and foster[s] reliance on adjudication, but also promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 95-96.

In that context, since 1790 Congress has required, through the Full Faith and Credit Act, that the "judicial proceedings" of each State be given "the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts" of the rendering State. 28 U.S.C. § 1738; *see* Act of May 26, 1790, ch. 11, 1 Stat. 122. This Court has made clear that the Act "directs all [federal] courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state." *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 373 (1996); *see also, e.g., Parsons Steel, Inc.* v. *First Ala. Bank*, 474 U.S. 518, 523 (1986); *Marrese* v. *American Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982); 18B Charles A. Wright et al., *Federal Practice and Procedure* § 4469, at 70 (2d ed. 2002). The FFCA "does not allow federal courts to employ their own rules in determining the effect of state judgments," but rather "goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken." *Kremer*, 456 U.S. at 481-482; *see also Matsushita*, 516 U.S. at 373; *Parsons Steel*, 474 U.S. at 523; *Marrese*, 470 U.S. at 380; *Allen*, 449 U.S. at 96 ("[T]hough the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.").

Under the FFCA and this Court's cases, the court of appeals was not free to disregard a judgment of a California court addressing petitioners' cognate state-law claims. Rather, the court of appeals properly looked to California law to determine the issue-preclusive effect of that adjudication in the federal case. First, it determined that the California courts would invoke the prior judgment to bar reliti-

gation of identical issues in a later case. Pet. App. 16a-17a (citing *Stolz* v. *Bank of America*, 15 Cal. App. 4th 217, 222, 19 Cal. Rptr. 2d 19, 22 (1993)).[11] The court of appeals then carefully considered petitioners' only suggestion that the federal issues were *not* identical: the contention that federal law should apply heightened *Nollan/Dolan* scrutiny to petitioners' claim of a "monetary exaction," which the state court had refused to do under state law. Pet. App. 17a; *see id.* at 17a- 21a.[12] Having rejected that contention, the court concluded that the California Supreme Court's determination of the issues underlying petitioners' state-law takings claim was "equivalent" to a determination of the issues relevant to the parallel claim under federal law. *Id.* at 21a. In light of that conclusion, it properly refused to allow petitioners to relitigate the same issues in federal court.[13]

[11] Petitioners now argue (Br. 19-21) that the Ninth Circuit misapplied California preclusion law. That issue of state law was not raised in the petition, and is not fairly included in the question presented. *See* S. Ct. R. 14.1(a); *Yee* v. *City of Escondido*, 503 U.S. 519, 535-536 (1992); *see also Allen*, 449 U.S. at 93 n.2 (declining to address specific application of state preclusion rules); *cf. Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983). In any event, the argument lacks merit. California courts apply issue preclusion to identical issues litigated and decided in a prior proceeding. *See, e.g., Lumpkin* v. *Jordan*, 49 Cal. App. 4th 1223, 1229-1230, 57 Cal. Rptr. 2d 303, 307 (1996); *Stolz*, 15 Cal. App. 4th at 222, 19 Cal. Rptr. 2d at 22. An issue may be identical for these purposes even if the claim raised in the subsequent proceeding is governed by a different sovereign's law. *See Calhoun* v. *Franchise Tax Bd.*, 20 Cal. 3d 881, 884-886, 574 P.2d 763, 764-765 (1978); *Lumpkin*, 49 Cal. App. 4th at 1231-1232, 57 Cal. Rptr. 2d at 308. In *American Continental Insurance Co.* v. *American Casualty Co.*, 86 Cal. App. 4th 929, 103 Cal. Rptr. 2d 632 (2001), on which petitioners rely, the court refused to apply issue preclusion because California and Arizona law *diverged* on the relevant issue. *See id.* at 945, 103 Cal. Rptr. 2d at 643 (refusing "to bind a California litigant to a principle of law adopted in the prior foreign court litigation *which is contrary to the law of California*") (emphasis added). Here, if the court of appeals had concluded that federal takings law differed materially from state takings law, as petitioners argued, it would not have treated the state judgment as conclusive. Instead, as described in the text, it concluded that the applicable state and federal law were "equivalent." Pet. App. 21a.

[12] Respondents have never conceded that petitioners' "substantially advance" challenge to the HCO states a proper theory of relief under the Just Compensation Clause. To the contrary, respondents contend that such challenges properly arise only in the narrow context, exemplified by *Nollan* and *Dolan*, in which government officials condition individual land-use permits on uncompensated public access to private property.

B. Petitioners Do Not Come Within Any Recognized Exception To The Full Faith And Credit Act

Petitioners scarcely discuss the federal statute that controls this case. *See* Pet. Br. 12, 17-19. (Likewise, only one of petitioners' nine amici even cites the FFCA. *See* Brief Amici Curiae of Equity Lifestyle Properties, Inc. et al. at 13.) Petitioners have not sought to invoke either of the established grounds for an exception—a superseding statute or a challenge to the basic fairness of the state proceedings. To the extent they address the FFCA at all, they seek to rely by analogy on this Court's decision in *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). That case is inapposite here.

1. The Court has made clear that a statutory exception to the FFCA "will not be recognized unless a later statute contains an express or implied partial repeal." *Kremer*, 456 U.S. at 468; *see also Parsons*, 474 U.S. at 523; *Marrese*, 470 U.S. at 381. Indeed, despite the theoretical possibility, the

[13] This Court denied review of petitioners' *Nollan/Dolan* question, and neither petitioners nor their amici have identified any other difference—real or alleged—in the substantive law applicable to petitioners' state and federal claims. To the contrary, the application of issue preclusion is so clear that even some of petitioners' amici take that conclusion as their starting point, arguing that the Court should reconsider its decision in *Williamson County* in light of the effect of the FFCA. *See* Brief of Amici Curiae Defenders of Property Rights et al. at 12-14; Brief of Amicus Curiae Franklin P. Kottschade at 16-27; Brief Amici Curiae of Evandro S. Santini et al. at 13. Whatever the merits of that suggestion, petitioners themselves have not questioned *Williamson County*, and the current case presents no occasion for revisiting it. *See, e.g., Dep't of Taxation & Fin.* v. *Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 77 n.11 (1994) (declining to address argument made by amicus that was not raised by parties or court of appeals); *see also* S. Ct. R. 14.1(a). Moreover, the Court should not consider overruling *Williamson County* without affording the City, thousands of other state and local governments, and other interested parties the opportunity to develop an appropriate record and respond to amici's evidence and arguments. *See Yee*, 503 U.S. at 538.

Court has "seldom, if ever" recognized an implied repeal. *Matsushita*, 516 U.S. at 380. Petitioners make no argument that any statute has repealed the FFCA in the context presented here, nor could they. The Court has twice held that 42 U.S.C. § 1983, which creates petitioners' cause of action here, does not impliedly repeal the FFCA. *Allen*, 449 U.S. at 97-98 ("nothing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738"); *Migra* v. *Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 83 (1984) ("*Allen* ... made clear that issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered."); *see also* 18B Wright et al., *supra*, § 4471.2, at 280.

2. A court also may refuse to enforce the FFCA if the original proceedings failed to "satisfy the minimum procedural requirements of the ... Due Process Clause." *Kremer*, 456 U.S. at 481; *see also* 18B Wright et al., *supra*, § 4471.2, at 306.[14] Petitioners do not contend that California's treatment of their claims failed to satisfy due process. They had two opportunities to amend their state complaint, and the opportunity to file briefs and argue orally in each of three courts. The California Superior Court, the Court of Appeal, and the Supreme Court all addressed the issues and arguments that petitioners laid before them. Indeed, petitioners prevailed

[14] The Court has sometimes described this principle more particularly as a requirement "that the first adjudication offer a full and fair opportunity to litigate." *Kremer*, 456 U.S. at 481; *see, e.g., Haring*, 462 U.S. at 313. The courts lack power to craft non-constitutional, common-law exceptions to the FFCA. Nonetheless, where applicable state preclusion law does not by its terms include a "full and fair litigation" requirement, that rule is imposed by the Due Process Clause: "A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment.... In such a case, there could be no constitutionally recognizable preclusion at all." *Kremer*, 456 U.S. at 482-483; *see also* 18B Wright et al., *supra*, § 4471.2, at 275-276.

in the Court of Appeal and received three of seven votes in the Supreme Court. They did not ultimately prevail, but they were surely fully heard.

3. Petitioners seek to reason by analogy from one principle, of "indefinite but narrow contours" (18B Wright et al., *supra*, § 4471.1, at 246) that this Court recognized in *England*. That decision did not discuss the FFCA, and thus did not by its terms create an "exception" to that Act. In any event, it does not help petitioners with the *Williamson County* question presented by the petition.

In *England*, the petitioner originally "properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims." 375 U.S. at 415. The federal court abstained from addressing those claims so that a state court could first determine distinct, predicate issues of state law. *Id.* at 413. The Court held that, in such a case, so long as the plaintiff did not voluntarily submit his federal claims to the state courts for resolution on the merits, the prudential doctrine of abstention should not result in those claims being precluded once the case returned to federal court. *Id.* at 415, 421-422.

As we discuss below, under *Williamson County*, a federal claim for just compensation based on a state or local taking does not arise, for purposes of federal jurisdiction, until the claimant has invoked available state remedies and the state has refused to provide compensation. *See* pp. 24, *infra*. Thus, in contrast to the abstention situation, a claimant cannot "properly invoke[] the jurisdiction" of the federal court (*England*, 375 U.S. at 415) to decide a federal compensation claim until he has first litigated a parallel state claim through any available and adequate state procedures. There is accordingly no concern here, as there was in *England*, that a prudential judicial abstention will lead to the effective abdication of federal jurisdiction. *See id.* at 416. As petitioners themselves recognize (Br. 13-14), *Williamson County*'s jurisdictional rule is not prudential, but is rooted in the nature of the Just Compensation Clause itself. At a claimant's first opportunity to invoke federal jurisdiction

over a federal just compensation claim, the FFCA instructs the court to accord any prior state-court judgment the same preclusive effect the State itself would give it.

As this Court has recognized, *England* is limited to the abstention context. *See Allen*, 449 U.S. at 101 n.17; *Migra*, 465 U.S. at 85 n.7. Even if the decision could properly be applied more broadly, however, it would not aid petitioners here. First, there would be no reason to extend *England* to bar *issue* preclusion in a *Williamson County* case. *England* held only that a plaintiff could explain his federal claim to a state court, to inform the state court's decision on a predicate and distinct issue of state law, without shifting the entire claim from federal to state court for final decision. *See* 375 U.S. at 419-421. The Court had no occasion to consider circumstances in which the plaintiff submitted to the state court state claims substantially identical to those potentially available under federal law, or in which adjudication of the submitted state claims necessarily addressed issues identical to those underlying a parallel federal claim. *England* did not hold that a plaintiff in state court may "reserve" any "right" to two full litigations of issues that are relevant to both state and federal claims.

Second, if petitioners are correct that *England* is analogous here, then the analogy is fatal to their case. *England* involved predicate state-law issues that the federal court decided should be resolved by the state courts. Certainly, the Court contemplated that the state decisions as to *those issues* would be fully preclusive if and when the case returned to federal court. Indeed, obtaining a binding state-court adjudication of those issues is the sole purpose for the federal court's abstention. If the issues underlying petitioners' federal just-compensation claims are analogous to the issues deferred to the state courts in *England*, then the state courts' resolution of those issues is final and preclusive.[15]

[15] *England* is perhaps relevant, by its terms, to petitioners' facial "substantially advance" claim, as to which the court of appeals originally ordered *Pullman* abstention. Petitioners, however, did not reserve that facial claim in state court. *See* JA 125-127. Nor have they even argued that applying issue preclusion to that claim was erroneous under *England* itself. The question presented concerns only the claim that the court of appeals originally found unripe under *Williamson County*. *See* Pet. i. In any event, an *England* reservation should not bar issue preclusion under the circumstances here for the reasons stated in the text. The court of appeals ordered abstention in this case only to permit the completion of petitioners' state administrative mandamus challenge to the City's application of the North Beach zoning ordinance, which the court thought might conceivably have some effect on petitioners' status under the HCO. *See* App. 16a. Nothing in *England* suggests that in light of that abstention, petitioners were entitled to amend their state complaint, as they did, to present a state facial "substantially advance" challenge to the HCO, while "reserving" the right to relitigate identical federal issues *de novo* if they should lose on the state-law claim. To the contrary, *England* indicates that to the extent a plaintiff "unreservedly litigat[es]" claims in state court that the abstention order did not require him to resolve there, he should not later "be allowed to ignore the adverse state decision and start all over again in the District Court." 375 U.S. at 419.

II. There Is No Basis For Creating An Exception To The FFCA In This Case

The FFCA and this Court's cases thus provide a straightforward answer to the question presented: The federal courts must accord the California Supreme Court's decision in this case the same issue-preclusive effect it would receive under California law. In seeking the opposite answer—allowing *de novo* federal litigation of issues already resolved by the state courts—petitioners effectively ask the Court to craft a new exception to the FFCA. In essence, they argue that this Court should displace the FFCA in light of *Williamson County*, because if it does not then claimants such as petitioners will be required to litigate issues relating to alleged state takings in state forums, and be bound by the results to the extent the issues resolved are also relevant to federal claims.

A. *Williamson County* Does Not Require An Exception

1. Petitioners contend that when this Court decided *Williamson County* it implicitly "promised" that "because . . . state court proceedings were required to ripen [a] federal takings claim," once those proceedings were concluded "the

federal courts [would be] required to disregard" them. Pet. Br. 7-8. Otherwise, they argue, *Williamson County* creates a "trap" that "effectively precludes consideration of the merits of federal takings claims in both state and federal court," with "no opportunity at all for this Court to review the merits." *Id.* at 16-17; *see id.* at 14. But *Williamson County* creates no such "trap"; and it assuredly never "promised" that if, in adjudicating a state takings claim, a state court resolves issues substantially identical to those underlying a federal claim, the claimant would nonetheless have the right to relitigate those very issues in federal court.

Williamson County holds that a federal cause of action seeking just compensation for an alleged taking by a state or local government does not accrue until the claimant has used available state procedures for obtaining compensation and can properly allege that the State has denied it. *See* 473 U.S. at 195; *see also City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999). As petitioners recognize (Br. 13), that approach is mandated by the nature of the Just Compensation Clause, which guarantees compensation—not freedom from the underlying taking.[16] Nothing in *Williamson County* suggests that the Court was concerned with providing a federal forum for takings claims. Indeed, the Court simply had no occasion to address how a federal court should adjudicate a federal compensation claim once it has properly accrued, including what respect is due under the FFCA to the state courts' prior resolution of issues that are relevant to both state and federal claims. It surely did not intend to carve out an exception to the FFCA without mentioning either the Act itself or its underlying principles of comity and preclusion.

[16] By contrast, as discussed above (at pp. 6-7), where (as, principally, here) a plaintiff claims that an enactment on its face does not substantially advance a legitimate state interest, the remedy is invalidation and other equitable relief, not compensation—and the claim accrues at the time of the government action. *See Yee*, 503 U.S. at 533-534; *see also* pp. 29-30, *infra*.

2. *Williamson County*'s explication of the nature of a federal compensation claim does not, as petitioners contend (Br. 14-17), bar any adjudication of that federal claim. Because the States typically do provide mechanisms for seeking compensation, federal compensation claims generally will not arise until there has been some adjudication in state court.[17] Thus, it is likely that in many or even most cases at least some issues germane to the federal claim will already have been addressed in state proceedings on a cognate state law claim. That does not, however, mean that any potential federal claim is lost.

In some States, petitioners may be able (or even required) to present any federal claim along with their state claims, as an alternative ground for relief in the event that state law does not provide what they claim as just compensation. *See, e.g., MC Assocs.* v. *Town of Cape Elizabeth*, 773 A.2d 439, 443 (Me. 2001); *Bruley* v. *City of Birmingham*, 675 N.W.2d 910, 918 (Mich. Ct. App. 2003), *appeal dismissed*, 679 N.W.2d 66 (Mich. 2004); *Guetersloh* v. *State*, 930 S.W.2d 284, 287-88 (Tex. App. 1996). In that event, the claimant may efficiently litigate both claims at the same time, with the opportunity to seek review by this Court of any contention that the state court has misconstrued or misapplied federal law. *See* 28 U.S.C. § 1257; *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 313 n.8 (1987); *cf. ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 617-625 (1989).

In other States, state courts may preclude a plaintiff who brings a just-compensation claim under state law from

[17] The federal claim is ripe without state proceedings if the claimant can show that state remedies are "unavailable or inadequate." 473 U.S. at 196-197; *see also, e.g., Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990) (no ripeness issue because California did not, at time of government action, provide compensation for regulatory takings); *Daniels* v. *Area Plan Comm'n*, 306 F.3d 445, 456-57 (7th Cir. 2002) (Indiana inverse condemnation action could not provide equitable relief); *Clajon Prod. Corp.* v. *Petera*, 70 F.3d 1566, 1575 (10th Cir. 1995) (defendant not subject to Wyoming inverse condemnation action).

concurrently presenting a contingent federal claim, because that claim has not yet arisen under *Williamson County*. *See* Pet. Br. 15; *Breneric Assocs.* v. *City of Del Mar*, 69 Cal. App. 4th 166, 188-89, 81 Cal. Rptr. 2d 324 (1998). In that event, a new federal claim (brought in either federal or state court) will not be barred by *claim* preclusion, precisely because it could not have been asserted in the prior state litigation. *See, e.g., Brown* v. *Felsen*, 442 U.S. 127, 131 (1979) ("Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding."). Indeed, as petitioners point out (Br. 18), respondents have never asserted claim preclusion in this case. As in this case, the claimant in such a new action may argue that federal law offers, or should offer, greater protection than state law in some respect. If such an argument prevails, then the claimant may recover on the federal *claim*, despite the preclusive effect of the prior state judgment as to *issues* that were adjudicated in the prior state litigation. And if the argument for more expansive federal protection fails in the lower courts, the claimant may still ask this Court to review it—just as petitioners did in this case. *See* Pet. i.[18]

There is, accordingly, no substance to petitioners' argument (Pet. 14-17) that the nature of federal just-compensation claims, combined with ordinary principles of *issue* preclusion, puts those *claims* beyond the reach of any court. What *is* true is that, as petitioners complain, a claimant frequently will not have the opportunity to demand initial adjudication of every relevant *issue* by a federal court. How

[18] Alternatively, even where a state court will not formally entertain a contingent federal compensation claim, the claimant may seek review in this Court directly from a state-court judgment that resolves a state compensation claim on grounds that clearly depend on the state court's understanding of federal law. *See generally Zacchini* v. *Scripps-Howard Broad. Co.*, 433 U.S. 562, 566-568 (1977); *Pennsylvania* v. *Muniz*, 496 U.S. 582, 589 n.4 (1990); *Ohio* v. *Reiner*, 532 U.S. 17, 21-22 (2001); *see also South Dakota* v. *Neville*, 459 U.S. 553, 556 n.5 (1983); *Delaware* v. *Prouse*, 440 U.S. 648, 652-653 (1979).

often that will be true, and what precise effect issue preclusion will have on later litigation of a federal claim, depends principally on how fully the States conform the protection provided by their own just-compensation law to that afforded by the federal Constitution, and to what extent the scope of federal protection is unsettled.

In recent years, many state courts have generally conformed their own takings law to federal law, so that in most instances fair litigation of a state compensation claim may now be tantamount to fair litigation of the entire federal claim. That result is fully consonant with the spirit of *Williamson County*—which points out that no federal compensation claim even *arises* unless the petitioner can allege that a State has both taken private property *and* refused to provide "just compensation" to the extent required by the Fifth Amendment. If a State provides a fair forum and adjudicates just-compensation claims under standards at least as protective as those of federal law, no alleged state or local taking need ever give rise to a meritorious federal claim. If and when there are actual or alleged differences between state and federal just-compensation law, nothing in the application of issue preclusion under the FFCA will prevent claimants from having the distinct federal issues considered and resolved by some competent forum as a matter of federal law.[19]

[19] There have been differences in the scope of state and federal takings law in the past. *See, e.g., Dodd* v. *Hood River County*, 136 F.3d 1219, 1228-1229 (9th Cir. 1998) (because Oregon courts recognize *Lucas* categorical taking but not *Penn Central* multi-factor taking, claimant entitled to federal forum on merits of *Penn Central* claim); *Galbraith* v. *Planning Dep't*, 627 N.E.2d 850, 852-853 (Ind. Ct. App. 1994) (suggesting that Indiana courts recognize *Lucas* categorical taking but not *Penn Central* taking theory); *compare Hall* v. *City of Santa Barbara*, 833 F.2d 1270, 1276-1278 (9th Cir. 1986) (finding that mobile home rent control law resulted in physical taking of property) *and Sierra Lake Reserve* v. *City of Rocklin*, 938 F.2d 951, 955 (9th Cir. 1991), *vacated*, 506 U.S. 802 (1992) (holding that plaintiff may bring mobile home rent control takings claim directly in federal court because California, unlike Ninth Circuit, did not recognize a cause of action for physical takings resulting from mobile home rent control) *with Yee* v. *City of Escondido*, 224 Cal. App. 3d 1349, 1355-1359, 274

3. Petitioners' objection to the operation of the FFCA here thus reduces to the point that because of the nature of the federal compensation claim, where States provide a forum for seeking compensation, a claimant will be forced to accept the adjudication of many relevant issues by state courts. As this Court has previously made clear, however, in refusing to recognize an exception to the FFCA,

> [t]here is . . . no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue [originally] arose in a state proceeding in which he would rather not have been engaged at all.

Allen, 449 U.S. at 104. *Allen* involved preclusion of issues resolved against the federal plaintiff when he was the defendant in a state criminal proceeding—a purely involuntary litigant. The same principle applies *a fortiori* to issues resolved in the state-court proceedings contemplated by *Williamson County*. Whether a claimant started in state court voluntarily or involuntarily is not relevant. The important point is that property owners have a means for seeking just compensation—not that they be able to litigate every issue twice. *See also Migra*, 465 U.S. at 84 (the FFCA "embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims").[20]

Cal. Rptr. 551, 555-557 (1990) (specifically rejecting *Hall* analysis of taking claim), *aff'd*, 503 U.S. 519 (1992).

[20] There are other contexts in which plaintiffs may press federal constitutional claims only in state courts. *See Fair Assessment in Real Estate Ass'n, Inc.* v. *McNary*, 454 U.S. 100, 116 (1981) ("[T]axpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts"; they "may ultimately seek review of the state decisions in this Court."). And there are other doctrines that result in state courts having the final authority to resolve federal issues, subject only to review by this Court. *See, e.g., Dist. of Columbia Ct. of App.* v. *Feldman*, 460 U.S. 462, 482 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 416 (1923); *New Orleans Pub. Serv., Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 360-361 (1989) (*Burford* doctrine).

4. Finally, we note that the facts of this case present a dubious context for complaints about the application of preclusion principles to genuine *Williamson County* claims. Petitioners' principal argument on the merits has always been that the HCO is invalid on its face, because it does not substantially advance legitimate state interests. *See, e.g.*, JA 31 (#167), 34-35 (#184), 44-45, 47. As the court of appeals recognized in *San Remo I* (*see* pp. 6-7, *supra*), *that* claim sought invalidation of the HCO, not compensation, and it was ripe—indeed, *over*-ripe—at the time of petitioners' original federal complaint. *See Yee*, 503 U.S. at 533-534. The district court held that it was time-barred—not that petitioners were required by *Williamson County* to litigate it first in the state courts. *See* Pet. App. 28a. To escape the consequences of that ruling, petitioners belatedly asked the court of appeals for *Pullman* abstention. That court obliged, on the theory that the outcome of petitioners' state administrative challenge to the City's application of the North Beach zoning ordinance might have some effect on the federal claim. App. 16a-17a. It was petitioners' other claims that the federal courts dismissed under *Williamson County*. App. 9a-10a.

Once back in state court, however, petitioners voluntarily amended their mandamus pleading and actively prosecuted the state version of their facial "substantially advance" claim—while effectively abandoning their "economic impact" claims. *See, e.g.*, Pet. App. 144a n.14. It was petitioners' always-ripe "substantially advance" claim—the claim unaffected by *Williamson County*—that petitioners pressed in the state courts; that the Supreme Court of California principally considered and decided; that petitioners principally renewed in federal court; that the district court again dismissed as time-barred; and that the court of appeals decided by invoking issue preclusion.[21] While petitioners may object

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[21] The court of appeals could also have affirmed dismissal of the "substantially advance" claim on the alternative time-bar ground, and that course is also open to this Court. *See, e.g., Bennett* v. *Spear*, 520 U.S. 154, 166-167 (1997). At a minimum, that ground remains open on any remand.

to the court's application of the FFCA, it is at best ironic for them to argue, in that regard, that they have been caught in some "trap" laid for them by *Williamson County*.

B. There Is No Justification For Refusing To Respect State Judgments In This Context

Ultimately, petitioners' position is that it is unacceptable to "consign[]" their compensation claims to state courts. Pet. Br. 14; *see* Brief Amicus Curiae of Pacific Legal Foundation et al. (Pacific Legal Fdn. Br.) at 15-16 (arguing expressly that state courts generally do not provide an adequate forum for the adjudication of federal takings claims). If petitioners could substantiate a contention that the state courts did not provide an adequate forum for the litigation of the issues raised by their state takings claims, then ordinary principles would prevent the state courts' determination of those issues from being preclusive. *See* pp. 20-21, *supra*. They could hardly make that argument in this case, however, given the attention their claims received from the California courts—including their victory in the state court of appeal, and their narrow loss in the state supreme court.[22] And any more general argument is untenable.

To begin with, it makes no sense to argue that state courts are not fully capable of fairly hearing and determining constitutional issues relating to local land use. If anything, state courts bring greater expertise to the typical takings action than their federal counterparts. Land-use planning and zoning are traditionally conducted at the local level, in response to local conditions. *See, e.g., FERC* v. *Mississippi*, 456 U.S. 742, 767 n.30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity."). While both state and federal courts are conversant with takings principles, state courts have a considerable advantage in applying—and even adjusting the actual operation of—the relevant state and local law. *See, e.g., Harlen Assocs.* v. *Inc. Village of*

[22] Nor is it entirely clear what petitioners hope to gain by relitigation in the federal courts, since the district court in this case indicated that it also would have rejected petitioners' claims on their merits. *See* Pet. App. 100a-103a.

Mineola, 273 F.3d 494, 505 (2d Cir. 2001) ("We repeat the admonition that federal courts should not become zoning boards of appeal. State courts are better equipped in this arena and we should respect principles of federalism . . . [and avoid] unnecessary state-federal conflict with respect to governing principles in an area principally of state concern.") (internal quotation marks and citations omitted); *see also* J. Juergensmeyer and T. Roberts, *Land Use Planning and Control Law* § 10.10(c), at 450-451 (1998) (application of FFCA and issue preclusion by federal courts to prevent relitigation of takings issues is reasonable in a system that "presumes state court competency" and where "state courts have greater experience in land use matters than federal courts"); Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under* Williamson County, 26 Ecology L.Q. 1, 45-46 (1999).

Moreover, there is no basis for speculation that state courts are systematically more or less likely than federal courts to be predisposed to favor either side in a takings case. *See* Pacific Legal Fdn. Br. 15-16. State judges may have just as close associations with property owners or developers as with local officials or proponents of regulation; and federal judges are as much local residents as their state colleagues. The judicial selection process may produce individuals with favorable or unfavorable philosophical predispositions in either the state or the federal system. And any analysis is unpredictable and unstable as to place and over time. Even if the inquiry were appropriate (which it is not), it would be entirely bootless.

In any event, this Court has made completely clear that inchoate distrust of state courts is not a permissible ground for resisting application of the FFCA. In *Allen*, the Court rejected any "general distrust of the capacity of the state courts to render correct decisions on constitutional issues" as even a "conceivable basis for finding a universal right to litigate a federal claim in a federal district court." 449 U.S. at 105. The Court instead noted its "emphatic reaffirmation

in [*Stone* v. *Powell*, 428 U.S. 465 (1976)] of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so." *Allen*, 449 U.S. at 105; *see also id.* at 103-104 (rejecting proposition "that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court"); *Kremer*, 456 U.S. at 476. In stressing later that the FFCA "embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims," the Court noted that its holding reflected "notions of comity," as well as "the need to prevent vexatious litigation, and a desire to conserve judicial resources." *Migra*, 465 U.S. at 84; *see also Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997) (opinion of Kennedy, J.) (refusing to "conclude that state courts are a less than adequate forum for resolving federal questions" or to embrace any "doctrine based on the inherent inadequacy of state forums," because it "would run counter to basic principles of federalism").

In short, there is nothing extraordinary about the court of appeals' application of standard issue-preclusion principles in this case. Indeed, it would be extraordinary not to apply them. Allowing federal takings claimants to ignore the full and fair adjudication of relevant issues by state courts, simply so that a federal court could pass on the same issues, would be a substantial affront to well-established principles of comity and federalism. Even more important, however, it would impose unique and substantial litigation costs on States and their subdivisions, which would be deprived of the benefit of the usual rules of preclusion, finality and repose that are reflected in their own laws, and that are normally incorporated into federal law by the FFCA. Municipalities, which in many cases already have extremely limited litigation budgets, face perennial fiscal crises.[23] A legal rule

[23] *See* Michael A. Pagano, National League of Cities, City Fiscal Conditions in 2004, at iii (2004), *available at* http://www.nlc.org/content/Files/RMPctyfiscalcondrpt04.pdf (reporting, inter alia, that 61% of 288 city finance directors surveyed expected that "their cities will be 'less able' to meet financial needs in 2005 than in [2004]"); Senate Comm. on the Judiciary, The Private Property Rights Implementation Act of 1998, S. Rep. No. 105-242, at 45 (1998) (minority views) (noting municipalities' limited budgetary capacity for litigation); Susan A. McManus, *The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms*, 44 Syracuse L. Rev. 833, 834-37 (1993) (noting major impact of "zoning and land development" litigation on cities, especially those in poor fiscal condition").

subjecting these entities to duplicative litigation would exacerbate this financial distress. *See* Brief of New York et al.; Brief of the National Association of Counties, et al.; Brief of Community Rights Counsel et al. Petitioners have suggested no adequate justification for imposing this wasteful burden on States and localities—or the matching burden on the federal courts. From any perspective, the regime of duplicative litigation sought by petitioners cannot possibly be the right result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE SAN REMO HOTEL, THOMAS FIELD,
ROBERT FIELD, AND T & R INVESTMENT CORP.,
Plaintiffs-Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, DEPARTMENT OF CITY PLANNING,
BOARD OF PERMIT APPEALS, AND
SAN FRANCISCO BOARD OF SUPERVISORS,
Defendants-Appellees.

No. 96-16843

Argued and Submitted Nov. 4, 1997
Decided June 3, 1998

[145 F.3d 1095]

Before: WOOD,* RYMER, and TASHIMA, Circuit Judges.

TASHIMA, Circuit Judge:

Success is sometimes said to be the father of failure, and this and like cases are before the courts because San Francisco's success in attracting tourists has fathered a failure in an adequate stock of housing for the low income and disadvantaged population of the City. In 1990, the City and County of San Francisco (the "City") revised its Hotel Conversion Ordinance ("HCO") to increase restrictions on the use of hotel rooms for tourists and to increase the expense of converting a hotel room from residential to tourist use. This

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* Honorable Harlington Wood, Jr., Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

revised ordinance has triggered several constitutional challenges based on the Takings Clause of the Fifth Amendment. *E.g., Golden Gate Hotel Ass'n. v. City and County of San Francisco*, 18 F.3d 1482 (9th Cir. 1994), *on remand*, 1994 WL 443666 (N.D. Cal. Aug. 2, 1994), aff'd, 76 F.3d 386 (9th Cir.) (Table), *cert. denied*, 519 U.S. 808, 117 S. Ct. 51, 136 L. Ed. 2d 15 (1996); *Lambert v. City and County of San Francisco*, 57 Cal. App. 4th 1172, 67 Cal. Rptr. 2d 562 (1997), *review granted*, 71 Cal. Rptr. 2d 215, 950 P.2d 59 (Cal. 1998). The present case is the latest installment.

Due to the procedural complexities of this case and the state law issues that may moot the Takings Clause challenge, we do not resolve the constitutionality of the HCO. Instead, we invoke *Pullman* abstention[1] and send the plaintiffs to state court. We note also that subsequent to the submission of this case for decision, the California Supreme Court granted hearing in a case involving the constitutionality of the HCO, *see Lambert*, 57 Cal. App. 4th 1172, 67 Cal. Rptr. 2d 562, *review granted*, 71 Cal. Rptr. 2d 215, 950 P.2d 59, and it may be that the California Supreme Court's decision will completely vindicate the plaintiffs' claims in state court, making a return to federal court unnecessary.

I. THE STATUTORY FRAMEWORK

San Francisco has enacted several hotel conversion ordinances in order to stop the depletion of housing for the poor, elderly and disabled. The City conducted a study that revealed that between 1975 and 1979, almost 20 percent of the residential hotel units in the City were lost due to demolition and conversion, and that most of the conversion **[*1099]** was from residential to tourist use. HCO § 41.3(d). In 1979, the City enacted its first HCO as a temporary measure, which it later codified as a permanent ordinance in 1981.

[1] *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941).

Under the 1981 HCO, hotel units could be converted to non-residential use only if the owner obtained a permit to convert. The City granted a permit only if the property owner provided relocation assistance to hotel residents and replaced the residential hotel units being converted through one of the following methods: (1) construction of an equal number of replacement units; (2) rehabilitation of an equal number of residential hotel units; or (3) contribution of a fee to the City's Residential Hotel Preservation Fund Account in the amount of 40 percent of the construction costs of the number of units converted (the "in lieu payment"). HCO §§ 41.12 & 41.13.

The 1981 HCO defined a "residential unit" as a hotel room occupied by a permanent resident as of September 23, 1979, *i.e.*, the 1981 HCO was an extension of the 1979 moratorium. To determine whether a unit was residential as of September 23, 1979, the City sent surveys to the operators of hotels.

In May 1990, the City repealed the 1981 HCO and enacted the 1990 HCO. This new ordinance made four changes from the old law: (1) it prohibited the summer tourist use of residential rooms; (2) it increased the in lieu payment from 40 percent to 80 percent; (3) it added the requirement that any hotel that rents rooms to tourists during the summer must rent the rooms at least 50 percent of the time to permanent residents during the winter; and (4) the new law did not provide for relief on the ground of economic hardship. To ease the effect of the new ordinance, the 1990 HCO allowed hotel owners who applied before May 12, 1990, to pay a 40 percent in lieu fee, instead of the otherwise-required 80 percent fee.

Entirely distinct from the HCOs are the City's zoning ordinances. In 1987, the City enacted the North Beach Neighborhood Commercial District zoning ordinance ("zoning law"), which requires conditional use authorization to establish a tourist hotel. Owners who establish a prior nonconforming commercial use are exempt from this requirement of obtaining a conditional use permit. The zoning law

borrows the September 23, 1979, classification from the HCO in order to determine what is a residential unit. In other words, a hotel unit that had been mistakenly characterized as residential under the HCO but that in fact was operating commercially as a tourist unit in 1987 would *not* be said to have a prior non-conforming use under the zoning law, despite the actual use of the unit.

II. THE FACTS

The plaintiffs are the owners of the San Remo Hotel, as well as the hotel itself; for convenience, we refer to them collectively as "Field." Field bought the San Remo Hotel in 1971, when it was zoned for commercial use and was subject to no restrictions on tourist use. He leased the hotel to Jean Irribarren (not a party) from 1977 to 1983. Irribarren spoke English badly, and when the 1979 survey arrived and asked him to indicate the nature of the hotel units for the new HCO, Irribarren mistakenly indicated that every single one of the hotel's 62 units was residential. Field had no notice or knowledge of this survey, or of Irribarren's responses.

In 1984, after the lease to Irribarren expired, Field again began operating the hotel. In his 1984 Annual Unit Usage Report, Field stated that the actual use of the hotel on September 30, 1984, was still as 62 residential units and zero tourist units. He explains this usage report by arguing that the 1981 HCO was not burdensome to comply with, even with the residential designation. In particular, the 1981 HCO allowed for unlimited tourist use of residential rooms from May to October, which are the most profitable months for a tourist hotel.

On May 11, 1990, Field applied under the 1990 HCO to convert the 62 residential rooms to tourist use. The City Zoning Administrator objected on the ground that if such a conversion were granted, the hotel would then be operating in violation of the zoning laws. After all, the 1987 zoning law looked back to the September 23, 1979, survey and characterized the hotel as entirely **[*1100]** residential. Therefore, even though the hotel had arguably been operating as a

tourist hotel when the zoning law was enacted in 1987, it was not considered a prior non-conforming use. In order to satisfy the zoning law, Field had to obtain a conditional use permit, which he has never gotten.[2]

Field then filed an application for a conditional use permit, so the hotel would no longer be operating in violation of the zoning law. The Planning Department scheduled a hearing for August 20, 1992, before the City Planning Commission to decide the merits of this application. On August 19, 1992, the Planning Department concluded that the Commission lacked jurisdiction to decide what the hotel's prior zoning status had been, and the parties agreed to continue the hearing until the Zoning Administrator could make such a determination. On September 9, 1992, the Zoning Administrator formally declared that the hotel had not been zoned for commercial use. Therefore, a conditional use permit would be required.

Field appealed to the Board of Permit Appeals ("BPA"), arguing that the hotel was already a permitted conditional use or a prior non-conforming use. Field also argued that using the HCO to convert the hotel into a truly residential hotel would be an unconstitutional taking and a denial of equal protection. The BPA rejected this argument and held the hotel bound by the 1979 classification. It concluded that the prior disobedience to the 1987 zoning law was not a prior non-conforming use but a special exception allowed (but no longer) by the Zoning Administrator. Thus, the BPA held that Field was required to get a conditional use permit.

The case then went back to the Planning Commission, which on January 21, 1993, approved Field's application for a conditional use permit, provided: (1) Field paid 40 percent of the cost of replacement housing to make up for the loss of the 62 residential units; (2) Field offered lifetime leases to

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[2] It would appear that Field had been operating in continual violation of the 1987 zoning law since its enactment, but only when he applied for the HCO conversion did the City Zoning Administrator finally insist on compliance with the zoning law.

existing long-term tenants; and (3) Field fulfilled other minor conditions.[3] The BPA affirmed.

On March 12, 1993, Field filed a petition for administrative mandamus in state court, challenging the BPA's decision that classified the hotel as residential. This mandamus action has been stayed by stipulation of the parties.

On April 19, 1993, the City's Board of Supervisors rejected Field's appeal of the Planning Commission's decision and upheld the conditions for the conditional use permit.

On May 4, 1993, Field filed this action against the City under 42 U.S.C. § 1983. Counts one and two of the amended complaint sought declaratory and injunctive relief from condition # 1 (the 40 percent fee) that the Planning Commission set for awarding the conditional use permit. Field alleged that this condition denied him procedural due process and substantive due process. Counts three and four alleged that the 1990 HCO was a facial and as-applied taking under the Fifth Amendment. Count five sought damages based on the above claims. Count six was a supplemental state law claim under the California Permit Streamlining Act.

On August 27, 1996, the district court granted the City summary judgment. The court ruled against Field on counts one and two on the grounds that procedural due process does not apply to statutes that apply to more than a few people, and that the substantive due process claim was barred by our decision in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). It also refused to let Field amend his complaint to state an equal protection claim, reasoning that amendment would be futile because any such claim would be precluded by the BPA's decision.

The court found that count three was invalid because Field failed to meet the statute of limitations, and that count four was invalid because the claim was unripe. It held count

[3] Fulfillment of these three conditions would also satisfy the conversion requirements under the HCO.

[*1101] five meritless because it was derivative of the first four counts, and it dismissed count six.

Field appeals, but he has dropped his procedural and substantive due process claims. Thus, we face only: (1) the facial takings claim; (2) the as-applied takings claim; (3) the equal protection issue; and (4) the state law claim under the California Permit Streamlining Act. In addition, Field argues for the first time on appeal that we should avoid deciding the takings claims because *Pullman* abstention is required.

We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, and reverse and remand in part.

III. CONSTITUTIONAL CLAIMS

The heart of this case is a constitutional challenge to the 1990 HCO as a violation of the Takings Clause of the Fifth Amendment, as incorporated by the Fourteenth Amendment. Complicating our review, however, are two factors. First, Field faces a number of procedural obstacles to the assertion of his constitutional claims. The district court dismissed them all as either unripe, barred by the statute of limitations, or precluded by a prior adverse judgment. Our threshold inquiry, therefore, is whether Field has any live federal constitutional claim. If he does not—that is, if the district court was correct—then the case ends here for Field, and we need decide nothing else.

However, if Field can survive these procedural hurdles, we then face a second difficulty: the possibility that Field might be able to obtain some or all of the relief he seeks without our having to resolve the difficult Takings Clause question. The Supreme Court has admonished that "[i]n litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S. Ct. 1055, 1072, 137 L. Ed. 2d 170 (1997). If the constitutional question before us might be mooted or substantially narrowed by decision of the state law claims intertwined with the constitu-

tional issues in this case, then our precedents require abstention in order to avoid an unnecessary conflict between state law and the federal Constitution. *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 409-10 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059, 118 S. Ct. 1386, 140 L. Ed. 2d 646 (1998); *Pearl Inv. Co. v. City and County of San Francisco*, 774 F.2d 1460, 1464 (9th Cir. 1985). Of course, if Field cannot clear the first hurdle, *i.e.*, if we conclude that all his constitutional claims are unripe, time-barred or precluded, abstention becomes irrelevant. There would be nothing to "abstain" from.

Accordingly, we begin our discussion with the first inquiry: Does Field have a live constitutional claim?

A. Facial Taking

Field's first constitutional claim is that the 1990 HCO is a facial taking of property without just compensation. He presses two, independent theories: that the HCO deprived him of the economically viable use of his hotel, *e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), and, alternatively, that the HCO is not sufficiently related to legitimate state interests. *E.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). The district court dismissed this claim as time-barred.

We begin our inquiry with a jurisdictional question-whether Field's facial takings claim is ripe for adjudication.[4]

Under our precedents, a facial takings claim alleging the denial of the economically viable use of one's property is unripe until the owner has sought, and been denied, just compensation by the state. *Sinclair Oil*, 96 F.3d at 406; *Levald v. Palm*, 998 F.2d 680, 686 (9th Cir. 1993). An exception ex-

[4] Because we conclude that the district court should have abstained under *Pullman*, we do not reach the statute of limitations issue.

ists where the state does not have a "reasonable, [*1102] certain, and adequate provision for obtaining compensation" at the time of the taking, in which case the facial takings claim is instantly ripe. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985); *Levald*, 998 F.2d at 686.

Field has not filed an inverse condemnation action in state court, and therefore has not been denied just compensation by California. It follows that Field's facial takings claim—insofar as it alleges the denial of the economically viable use of his property—is unripe, unless California's inverse condemnation procedures were inadequate to compensate Field when the alleged taking occurred, *i.e.*, in 1990.

Unfortunately for Field, however, this alleged taking occurred three years too late. Prior to 1987, California did not recognize an inverse condemnation claim for regulatory takings, but in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 310-11, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987), the Supreme Court held this restriction on inverse condemnation claims unconstitutional. If the taking of which Field complains had occurred before 1987, resort to the California state courts would not have been required because it would have been futile. *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990). *See also Levald*, 998 F.2d at 687-88. However, *First English* changed the law, and we have expressly held that, post-1987, California's inverse condemnation procedures are adequate to address a regulatory takings claim. *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 164 (9th Cir. 1993); *Schnuck v. City of Santa Monica*, 935 F.2d 171, 174 (9th Cir. 1991). These precedents control the case *sub judice*, and bar Field's first theory of a facial taking as unripe.

Field's other theory behind his facial takings claim is that the 1990 HCO does not substantially advance legitimate state interests. For this facial takings theory, we have held that the denial of just compensation is irrelevant for purposes of ripeness. *Sinclair Oil*, 96 F.3d at 407. Therefore,

Field's claim was ripe the instant the 1990 HCO was enacted. Accordingly, to the extent that Field argues that the 1990 HCO is a facial taking because it is not sufficiently related to legitimate state interests, his facial takings claim is ripe. We conclude, therefore, that Field has a live federal constitutional claim challenging the 1990 HCO as a facial taking of property.

B. As-Applied Taking

Field's second constitutional claim is an as-applied taking challenge to the 1990 HCO. The district court held that this claim is unripe, and we agree.

In order to assert an as-applied takings claim, a plaintiff must establish two things: (1) the governmental entity has reached a final decision on the applicability of the regulation to the plaintiff's property; and (2) the plaintiff is unable to receive just compensation from the government. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, ---- - ----, 117 S. Ct. 1659, 1664-65, 137 L. Ed. 2d 980 (1997); *Williamson County*, 473 U.S. at 186, 194, 105 S. Ct. 3108.

Field clearly fails the second ripeness requirement because he has not pursued an inverse condemnation claim in state court. The Fifth and Fourteenth Amendments do not prohibit the taking of property; they prohibit the taking of property without just compensation. *Williamson County*, 473 U.S. at 194, 105 S. Ct. 3108. Therefore, there is no constitutional injury until the plaintiff has availed himself of the state's procedures for obtaining compensation for the injury, and been denied compensation. *Id.* As with his unripe facial takings theory, Field argues that he is excused from filing an inverse condemnation claim because California's procedures are inadequate for regulatory takings. Again, we reject this argument.

Accordingly, we affirm the district court's dismissal of Field's as-applied takings claim as unripe.

C. Equal Protection

In the district court, Field argued that the City's refusal to recognize the hotel as a prior non-conforming use under the zoning **[*1103]** law denied him procedural and substantive due process. Field has dropped his procedural due process claim, and admits on appeal that his substantive due process claim is foreclosed by our decision in *Armendariz*.

In the district court, Field moved to amend his complaint to recharacterize his due process claim for injunctive relief as an equal protection claim, but the district court denied this motion on the ground that the equal protection claim would be precluded by the BPA's adverse decision, and therefore amendment would be futile. In making this ruling, the district court also noted that comity and finality concerns favoring state court review of administrative decisions "counsel[ ] for abstention until a final judgment is reached by the state court" in Field's mandamus action.

We review the denial of leave to amend for abuse of discretion, *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d 1502, 1511-12 (9th Cir. 1991), but we review the underlying legal issue of the availability of preclusion de novo. *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1032 (9th Cir. 1994).

The district court incorrectly concluded that Field's equal protection claim would have been precluded by the BPA's adverse decision. Federal courts give a state judgment the same preclusive effect that that judgment would receive in state court. This rule extends to state administrative decisions, as well as judicial decisions. *Misischia v. Pirie*, 60 F.3d 626, 629 (9th Cir. 1995). Thus, an unreviewed agency decision against a federal plaintiff can preclude a § 1983 suit in federal court, even though § 1983 does not have an exhaustion requirement. *Id.* at 628- 31; *Miller*, 39 F.3d at 1032. However, California does not extend preclusive effect to non-final agency decisions. *Long Beach Unified Sch. Dist. v. State*, 225 Cal. App. 3d 155, 169, 275 Cal. Rptr. 449 (1990) ("A direct attack on an administrative decision may be made by appeal to the superior court for review

by petition for administrative mandamus. . . . A decision will not be given collateral estoppel effect if such appeal has been taken. . . ."). *See also National Union Fire Ins. Co. v. Stites Prof. Law Corp.*, 235 Cal.App.3d 1718, 1726, 1 Cal.Rptr.2d 570 (1991) ("When, as here, a judgment is still open to direct attack by appeal or otherwise, it is not final and the doctrines of res judicata and collateral estoppel do not apply.").

Field has sought administrative review of the BPA's decision in a state court mandamus action that has since been stayed by stipulation of the parties. Therefore, the BPA's decision is not final and is not entitled to preclusive effect.

Nonetheless, we affirm. The amendment of Field's complaint to state an equal protection claim would have been futile because the district court would have had to dismiss the claim under *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971).[5] Under *Younger* abstention, federal courts may not grant declaratory or injunctive relief that would interfere with state criminal or civil proceedings, including state administrative proceedings that are judicial in nature. *Delta Dental Plan v. Mendoza*, 139 F.3d 1289, 1293-94 (9th Cir. 1998); *Aiona v. Judiciary of the State of Hawaii*, 17 F.3d 1244, 1248 (9th Cir. 1994). Absent extraordinary circumstances, *Younger* abstention is required if the state proceedings are (1) ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims. *Hirsh v. Justices of the Supreme Court*, 67 F.3d 708, 712 (9th Cir. 1995). Unlike *Pullman* abstention, *Younger* abstention requires dismissal of the federal claim for injunctive relief, not a stay. *Delta Dental Plan*, 139 F.3d 1289, 1293-94.

[5] Although the district court did not specifically abstain under *Younger*, it effectively applied this doctrine when it stated that comity and finality concerns "counsel" for abstention until a final state court judgment on Field's mandamus action is rendered. In any event, we can raise *Younger* abstention *sua sponte*. *See Barichello v. McDonald*, 98 F.3d 948, 955 (7th Cir. 1996) (recognizing federal court's power to raise *Younger* abstention *sua sponte*).

We need not decide whether the BPA's decision-making process was sufficiently judicial in nature to warrant *Younger* abstention, *see* **[*1104]** *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 370-73, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989) (describing inquiry), because it clearly became judicial when Field filed his petition for mandamus in state court, seeking review of the BPA's decision. Therefore, the *Younger* test is applicable.

Prong one of the test is satisfied because Field's mandamus action was pending at the time this suit was filed. It is irrelevant that the state mandamus action was stayed by the stipulation of the parties to allow the federal suit to proceed. As we made clear in *Wiener v. County of San Diego*, 23 F.3d 263 (9th Cir. 1994), our inquiry on prong one of the Younger test is not on what is currently occurring in the state proceedings, but is focused on the narrow question of whether they were pending at the time the federal suit was filed, *id.* at 266; *see also Kitchens v. Bowen*, 825 F.2d 1337, 1341 (9th Cir. 1987), and Field's mandamus action was pending at that time. Because the whole point of *Younger* abstention is to stop federal interference with state proceedings, it seems backwards to reject abstention because the state proceedings have been stayed to allow the federal case to proceed. This is exactly the interference that *Younger* abstention is designed to prevent.

Prong three is indisputably satisfied, leaving only prong two, which is also clearly met. The City has a strong interest in its land-use ordinances and in providing a uniform procedure for resolving zoning disputes. *Cf. Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359, 361 (9th Cir. 1993) (recognizing strength of municipal interest in rent control); *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1094-95 (9th Cir. 1976) (recognizing California municipalities' interest in land-use regulation). We have held that strong, local, *i.e.*, municipal, interests in land-use regulation qualify as important "state" interests for

purposes of Younger abstention. *Mission Oaks*, 989 F.2d at 361.

Accordingly, all three requirements for *Younger* abstention have been met. Therefore, we affirm the district court's denial of leave to amend Field's complaint as futile, albeit on the ground that his equal protection claim would have been barred by *Younger*.

IV. PULLMAN ABSTENTION

From the foregoing analysis, it is clear that Field has partially survived the first hurdle in this case. That is, he has convinced us that he has a live facial Takings Clause challenge to the 1990 HCO based on the theory that the HCO is not sufficiently related to legitimate state interests. His other claims—the as-applied takings claim, and his equal protection claim—do not clear the first hurdle, and we now put them aside.

On the live constitutional claim, we turn to the second hurdle: "Is this conflict really necessary?" Because of the state law issues in this case, we must answer this question in the negative and invoke *Pullman* abstention.

Pullman abstention is an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions. Abstention is appropriate when: (1) the federal plaintiff's complaint requires resolution of a sensitive question of federal constitutional law; (2) the constitutional question could be mooted or narrowed by a definitive ruling on the state law issues; and (3) the possibly determinative issue of state law is unclear. *Sinclair Oil*, 96 F.3d at 409 (citing *Pearl Inv. Co.*, 774 F.2d at 1463); *Rancho Palos Verdes Corp.*, 547 F.2d at 1094. Once *Pullman* abstention is invoked by the federal court, the federal plaintiff must then seek a definitive ruling in the state courts on the state law questions before returning to the federal forum. *Pullman*, 312 U.S. at 501-02, 61 S. Ct. 643; *Rancho Palos Verdes Corp.*, 547 F.2d at 1096.

Ironically, it is Field who urges us to abstain under *Pullman*. Normally, of course, *Pullman* abstention is invoked by the defendant, not only because it is the plaintiff who initially chose the federal forum (and thus presumably wants it), but because *Pullman* abstention tends to delay resolution of the plaintiff's constitutional claims. *See Arizonans for Official English*, 117 S. Ct. at 1073. Unsurprisingly, the City views Field's **[*1105]** request for abstention as an outrageous act of chutzpah, and argues that Field should be stuck with the federal forum he chose. Although we have some sympathy for the City's position, we agree with Field that a plaintiff may raise *Pullman* abstention just as a defendant may, and he may do so for the first time on appeal.

Pullman abstention does not exist for the benefit of either of the parties but rather for "the rightful independence of the state governments and for the smooth working of the federal judiciary." *Pullman*, 312 U.S. at 501, 61 S. Ct. 643 (internal quotation marks omitted). As the Seventh Circuit has explained: "When a court abstains in order to avoid unnecessary constitutional adjudication . . . it is not seeking to protect the rights of one of the parties; it is seeking to promote a harmonious federal system by avoiding a collision between the federal courts and state (including local) legislatures." *Waldron v. McAtee*, 723 F.2d 1348, 1351 (7th Cir. 1983) (citation omitted). There is no reason why federal defendants should have a monopoly on preserving the harmonious functioning of the federal and state court systems, and there is no reason why a federal plaintiff cannot also argue for *Pullman* abstention. We are not concerned with tactical advantages to be gained from invoking *Pullman* abstention, but only with the comity reasons for abstention, and we willingly accept the suggestion by any party on how better to serve those interests.

Nor do we refuse to consider *Pullman* abstention because it was not raised before the district court. We assume that, as a matter of the responsible conduct of litigation, a party desiring to raise abstention will normally seek it first

in the district court. But we have held that the court of appeals may *sua sponte* consider *Pullman* abstention. *Richardson v. Koshiba*, 693 F.2d 911, 915-17 (9th Cir. 1982); *see also Barichello*, 98 F.3d at 955. And it is obvious that, if we ourselves can raise an issue for the first time on appeal, then the parties may do so as well. In any event, having determined that Field has properly raised the abstention question, we now decide whether to invoke the doctrine here.

The federal claim in this case is the facial takings challenge to the 1990 HCO, and we have "consistently held that land use planning is a sensitive area of social policy that meets the first requirement for *Pullman* abstention." *Sinclair Oil*, 96 F.3d at 401 (quoting *Kollsman v. City of Los Angeles*, 737 F.2d 830, 833 (9th Cir. 1984)); *see also Rancho Palos Verdes Corp.*, 547 F.2d at 1094-95; *Sederquist v. City of Tiburon*, 590 F.2d 278, 281-82 (9th Cir. 1978).

The second and third requirements for *Pullman* abstention are met as well. Field's entire case—the applicability of the HCO and the need to obtain a conditional use permit—hinges on the designation of his hotel as "residential." Yet, that is precisely the designation he is challenging in his state mandamus action. In that action, he claims that the BPA erred as a matter of state law in ignoring the actual use (as opposed to the stated use) of his hotel prior to 1990. This claim will necessarily require the court to decide on the meaning of a prior non-conforming use under municipal zoning law, what effect should be given to Irribarren's mistaken designation of the hotel's rooms as residential, and whether a change in zoning designation also alters the hotel's residential/tourist designation under the HCO. These are all uncertain issues of state law, and a state court reversal of the BPA's ruling would moot Field's constitutional claim.

In these circumstances, *Pullman* abstention is appropriate. We reverse[6] the district court's dismissal of Field's

[6] We style this a "reversal" because under our precedents, a holding that the district court should have abstained under *Pullman* is deemed a reversal of a dismissal. *E.g., Isthmus Landowners Ass'n v. California*,

facial takings claim and remand with instructions to enter a stay under *Pullman*.

V. The Permit Streamlining Act

Field's final claim in this case is a supplemental state law claim under the California Permit Streamlining Act. Cal. Gov't Code § 65920 *et seq.* The City argues that this **[*1106]** claim is moot because, since the notice of appeal was filed, it has granted Field the variance he sought for off-street parking. Field does not deny this assertion. In fact, although Field mentions the Permit Streamlining Act in the course of discussing *Pullman* abstention, he never actually says that he has a live claim under that act, he does not mention any such claim in the "issues on appeal" section of his brief, and he does not ask us to reverse the district court's dismissal of this claim. Field has therefore either abandoned this claim on appeal, or tacitly conceded its mootness. Either way, we affirm the district court's dismissal of this state law claim.

VI. Conclusion

We affirm the district court's dismissal of Field's as-applied takings claim, the denial of leave to amend the complaint to state an equal protection claim, and the dismissal of the Permit Streamlining Act claim. We reverse the district court's dismissal of Field's facial takings claim and remand with instructions to abstain under *Pullman*.[7] Each side shall bear its own costs on appeal.

601 F.2d 1087, 1091 (9th Cir. 1979); *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 842 (9th Cir. 1979).

[7] When Field presents his state law claims to the California courts, he is free to present his federal takings claim to them as well. *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 420-21, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964). If he wishes to retain his right to return to federal court for adjudication of his federal claim, he must make an appropriate reservation in state court. *Id.* at 421, 84 S. Ct. 461; *see also United Parcel Serv., Inc. v. California Pub. Util. Comm'n*, 77 F.3d 1178, 1182-88 (9th Cir. 1996) (discussing *England* reservation).

AFFIRMED in part, REVERSED and REMANDED in part.

(25)

No. 04-340

IN THE

Supreme Court of the United States

SAN REMO HOTEL, L.P., THOMAS FIELD, ROBERT FIELD AND T & R INVESTMENT CORP.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY ON THE MERITS

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TABLE OF CONTENTS

INTRODUCTION 1

I. THIS COURT HAS ALREADY DECIDED THAT PLAINTIFFS REQUIRED TO PURSUE STATE COURT ACTIONS BEFORE THEIR FEDERAL CLAIMS MAY BE CONSIDERED SHOULD NOT BE PRECLUDED BY THE STATE COURT DETERMINATION 4

A. This Court Was Well Aware of the Full Faith and Credit Act When it Decided *Williamson County* ... 5

B. The City's Remaining Arguments Merely Point out the Inherent Costs of Permitting Two Separate Proceedings, Which this Court Accepted When it Decided *Pullman* and *Williamson County* 10

1. The City's Observations that Other Bodies of Federal Law Do Not Present the Same Issues as *Williamson County*'s Rule Permitting Two Proceedings Merely Point out the Obvious Costs That Were Fully Considered by this Court Long Ago 11

2. The Field Brothers Followed *Williamson County*'s Procedures: Their Actions Provide No Reason to Reconsider Their Right to a Full Merits determination of their Constitutional Claims 12

3. The City's Argument That *Williamson County* is Costly to Cities is Hardly an Answer to the Field Brothers' Right to Have Their Ripe Constitutional Claims Heard and Is, in any Event, False 14

II. UNDER CALIFORNIA LAW, A DECISION UNDER STATE LAW THAT THE FIELD BROTHERS' COMPLAINT DID NOT STATE A CLAIM FOR COMPENSATION HAS NO PRECLUSIVE EFFECT ON THE FIELD BROTHERS' FEDERAL TAKINGS CLAIMS .. 15

CONCLUSION 17

TABLE OF AUTHORITIES

Cases:

Calhoun v. Franchise Tax Board,
20 Cal.3d 881, 574 P.2d 763 (1978) 16

DLX, Inc. v. Kentucky,
381 F.3d 511 (6th Cir.2004) 10

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) ... *passim*

Federated Department Stores, Inc. v. Moitie,
452 U.S. 394 (1981) 5

Lumpkin v. Jordan, 49 Cal.App.4th 1223,
57 Cal.Rptr.2d 303 (1996) 16

Migra v. Warren City School District Board,
465 U.S. 75 (1984) 17

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 13

Penn Central Transportation Co. v. City of New York,
438 U.S. 104 (1978) 7, 13

Railroad Commission of Texas v. Pullman Co.,
312 U.S. 496 (1941) ..... *passim*

San Remo Hotel v. City and County of San Francisco,
145 F.3d 1095 (9th Cir. 1998) (*San Remo I*) 13

San Remo Hotel v. City and County of San Francisco,
364 F.3d 1088 (9th Cir. 2004) (*San Remo III*) 16

Santini v. Connecticut Hazardous Waste Management Service, 342 F.3d 118 (2d Cir. 2003) 2, 5, 8-10

Suitum v. Tahoe Regional Planning Agency,
520 U.S. 725 (1994) 9

University of Tennessee v. Elliott,
478 U.S. 788 (1986) 5, 6

Wilkinson v. Pitkin County Bd. of County Commissioners,
142 F.3d 1319 (10th Cir. 1998) 6

Williamson County Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) . *passim*

Yee v. City of Escondido, 503 U.S. 519 (1992) 13

Constitutional and Statutory Provisions, Rules

U.S. Const. Fifth Amend. ..... *passim*
28 U.S.C. § 1738 ..... *passim*
42 U.S.C. § 1983 17
HCO § 41.13(f) 15
S. Ct. Rule 15.2 13

Other Authorities

Berger, Michael and Kanner, Gideon, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671 (2004) 6

Davis, K., Administrative Law Treatise,
Vol. 4 (2d ed. 1983) 5, 6

INTRODUCTION

Twelve years ago, the Field Brothers filed claims under the Fifth Amendment to the United States Constitution. Since then, the City and County of San Francisco argued at every turn, and for many reasons, that the Field Brothers' constitutional claims may not be heard on their merits in federal court. And for good reason: the Field Brothers have presented compelling claims under the Fifth Amendment. The City's $567,000 permit condition to allow the Field Brother to continue their decades-long and duly-licensed operation of the San Remo Hotel is an unconstitutional exaction.

Here, the City's many arguments that the Field Brothers' constitutional claims should not be heard have dwindled to one. In this Court, the City argues that the Full Faith and Credit Act requires that this Court affirm the dismissal of the Field Brothers's ripened constitutional claims before they have been considered on the merits by any court, in any jurisdiction.

This Court has already answered the City's argument. Where litigants are required to pursue state law claims in state court before they are permitted to pursue federal claims, they are entitled to a full federal court determination on the merits of their claims. That was this Court's *holding* in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). As this Court emphasized:

> The line drawn should be bright and clear, so that litigants shunted from federal to state courts . . . will not be exposed . . . to procedural traps operating to deprive them of their right to a District Court determination of their federal claims.

Id. at 418; see also *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 127-130 (2d Cir. 2003).

The line is "bright and clear" for good reasons. After a state court decides state law issues, the federal courts are the only courts left to hear the remaining federal constitutional claims. Any other line would defeat the rights of plaintiffs with ripened federal claims to have a court, in some jurisdiction, somewhere, resolve their federal claims under federal law.

The City will have nothing of *England*'s bright line, or the settled principles that required it. For Takings cases only, the City argues, plaintiffs with ripe federal constitutional claims are not entitled to consideration of their claims under federal law by any court. After the state court renders a decision under state compensation law, the City concludes, "no alleged state or local taking claim need ever give rise to a meritorious federal claim." Resp. Brf. 27. Under the City's view, the only issue left for the federal courts is whether state preclusion laws permit the federal court to decide the federal Takings claims.

As a necessary corollary, there will rarely, if ever, be a federal issue that will "give rise" to this Court's jurisdiction. This Court would have no jurisdiction over the state court decisions required under *Williamson County* since those decisions would involve only state law, and this Court would have no jurisdiction over federal court judgments because those judgments would be limited to state law preclusion issues. As the City concedes, this Court would have jurisdiction to consider federal Takings claims only when state compensation law denies Fifth Amendment rights on its face or when state preclusion law *permits* the federal courts to consider the merits of the federal claims. Resp. Brf. 25-27. In short, the Supremacy Clause would be reversed -- for Takings cases only and solely because of this Court's own decisions.

The cities would be elated. But their wish does not make it so, especially when the wish is to limit this Court's jurisdiction and change its settled decisions. Far from abandoning the principles set out in *England* for *Pullman*-abstention cases, this Court's *Williamson County* decision is completely consistent with *England*'s principles. Under *Williamson County*, after the state litigation required to ripen their Takings claims, plaintiffs may either (1) obtain compensation from the state courts under state law and thus moot the federal constitutional claim or (2) obtain federal court review when the state courts deny compensation. *Williamson County*, 473 U.S. at 194-195. No other result would provide plaintiffs with ripe constitutional claims a forum to resolve those claims, or protect the rights of federal courts to determine their role in deciding federal constitutional claims.

Three years ago, the Field Brothers met the ripeness requirements of *Williamson County*, but the lower federal courts have refused to decide the merits of their ripe claims under the Fifth Amendment. This Court should remand the case for full consideration of the Field Brothers' claims on the merits.

I. THIS COURT HAS ALREADY DECIDED THAT PLAINTIFFS REQUIRED TO PURSUE STATE COURT ACTIONS BEFORE THEIR FEDERAL CLAIMS MAY BE CONSIDERED SHOULD NOT BE PRECLUDED BY THE STATE COURT DETERMINATIONS

The City has never denied the dispositive points in this appeal. The Field Brothers have ripened their federal Takings claims under *Williamson County* and the Field Brothers' ripened federal claims have not been decided on the merits by any court in any jurisdiction.

For the City, that result is perfectly reasonable. Indeed, the City believes that, under *Williamson County*, "no alleged state or local taking need ever give rise to a meritorious federal claim." Resp. Brf. 27. For the City, *Williamson County* stands for the federal courts' virtually unflagging relegation of jurisdiction over federal Takings claims to the state courts.

That was not this Court's decision in *Williamson County Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Indeed, no *phrase* in the *Williamson County* opinion even suggests that it is permissible to deny plaintiffs review of their ripe federal claims by any court, in any jurisdiction. With no decision of this Court to rely upon, the City invokes the res judicata principles underlying the Full Faith and Credit Act, 28 U.S.C. § 1738 (the "Act"). The City argues that -- when deciding *Williamson County* -- this Court "did not discuss" and "thus did not by its terms create an 'exception' to that Act." Resp. Brf. 21.

As outlined below, however, this Court was fully aware of the Act when it decided *Williamson County*. As in *England*, principles of comity are respected by permitting the state courts an opportunity to determine state law claims that may moot

federal questions, and the rights of litigants and the primacy of the federal courts are preserved by permitting federal claims to be considered in full by the federal courts.

A. This Court Was Well Aware of the Full Faith and Credit Act When it Decided *Williamson County*

The City's legal argument begins with a paean to the virtues of res judicata rules underlying the Full Faith and Credit Act:

> "It is a rule of fundamental and substantial justice[.]"
>
> "The law of res judicata, much more than most other segments of law, has rhyme, reason, and rhythm – something in common with good poetry. Its inner logic is rather satisfying."

Resp. Brf. 16, quoting *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) and *University of Tennessee v. Elliott*, 478 U.S. 788, 798 (1986), quoting 4 K. Davis, Administrative Law Treatise § 21.9 at 78 (2d ed. 1983).

The City confidently asserts that this "rhyme, reason, and rhythm" require the conclusion that "no alleged state or local taking need ever give rise to a meritorious federal claim." Resp. Brf. 27. Accordingly, the "inner logic" that is so "satisfying" tells the City that the Field Brothers' ripe constitutional claims need not be heard by any court, in any jurisdiction.

The Second Circuit and legal commentators disagree. When the res judicata rules are applied unthinkingly to Takings cases, the result, as in the Field Brothers' case, is a "Catch-22." *Santini*, 342 F.3d at 127-130. Among other things, the legal commentators believe that the Ninth Circuit's holding is "Kafkaesque" and "inherently nonsensical." Pet. Brf. 16, citing

Berger, Michael and Kanner, Gideon, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671, 702-703 (2004) (citations omitted).

There is an explanation for how the elegant law of res judicata could produce such unjust results in Takings cases. In *Williamson County*, like *Pullman*, this Court set out a procedure that sometimes *requires* two separate litigations. When two proceedings are required to allow the state courts an opportunity to moot federal claims, the second proceeding is, and must be, contrary to the general rules of res judicata. Even the City acknowledges that the law of res judicata "consists entirely of an elaboration of the obvious principle that a controversy should be resolved once, not more then once." Resp. Brf. 16, quoting *University of Tennessee*, 478 U.S. at 798, quoting 4 K. Davis, Administrative Law Treatise § 21.9 at 78. But, that principle cannot be squared with this Court's determination that two separate litigations may be required in Takings cases. *Wilkinson v. Pitkin County Bd. of County Commissioners*, 142 F.3d 1319, 1325 n. 4 (10th Cir. 1998) ("It is difficult to reconcile the ripeness requirement of *Williamson* with the laws of res judicata and collateral estoppel.").

This Court's decisions in *Williamson County* and *Pullman* had more than one issue in mind. In both cases, this Court concluded that state courts should decide state law issues because they might avoid the need to decide the federal issues. *Williamson County*, 473 U.S. at 194-195 (if the state courts award compensation, there is no federal Takings claim); *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941) (if the state law issue is decided in favor of the plaintiff, "the constitutional issue does not arise.") This Court held that the cost of two litigations was an acceptable price.

This Court's decision in *England* decided even more. This Court held that the federal courts are not bound by state law determinations when they consider the federal claims. *England*, 375 U.S. at 417 (party has the "right to litigate his federal claims fully in the federal courts").

The City has a different view: "*England* did not hold that a plaintiff in state court may 'reserve' any 'right' to two full litigations of issues that are relevant to both state and federal claims." Resp. Brf. 22. But, that is *precisely* what *England* held. As this Court explained, once the state courts have decided the state law claims, the federal claims must be resolved without regard to the state court's decision:

> This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. "It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested fact issues."

England, 375 U.S. at 416-417 (citation omitted). Of course, that is particularly true of Takings claims, which involve "ad hoc factual inquiries." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 125 (1978).

After misstating *England*'s holding, the City argues that this Court did not even consider the Full Faith and Credit Act's underlying principles of comity and preclusion. Resp. Brf. 21. But, once again, that was precisely what this Court did consider. In *England*, this Court held that -- when two separate litigations are required -- federal plaintiffs should not be deprived of "their right to a District Court determination of their federal claims." *England*, 375 U.S. at 418; see also *England*, 375 U.S. at 414-415 (recognizing that "established principles will bar a relitigation" and "effectively deprive[] [the plaintiff] of a federal forum").

The Second Circuit agrees, concluding that this Court's rationale in *England* must apply to Takings cases shunted to the state court by *Williamson County*. *Santini*, 342 F.3d at 127-130. While the City does not even mention *Santini*, it does try to distinguish the Second Circuit's decision. The City argues that, under *Williamson County*, the state compensation claims require the state courts to "address[] issues identical to those underlying a parallel federal claim" and that *England* did not consider that situation. Resp. Brf. 22.

The City's "distinction" is hollow. In *Pullman*, as in *Williamson County*, this Court gave the state courts an opportunity to moot the federal constitutional claims. And, under *Pullman*, the state courts are asked to determine state law in a manner that does not violate federal law; i.e., the state courts must consider the factual and legal issues raised by the federal constitutional claims when deciding the state law claims. See *England*, 375 U.S. at 420-421 (If the plaintiff can persuade "the state court that application of the [state] statute to him would offend the Federal Constitution, he will ordinarily

have persuaded it that the statute should not be construed as applicable to him.").[1]

When that endeavor fails under *Pullman* or *Williamson County*, the result is the same. The federal courts are faced with a federal claim that has never been considered by any court in any jurisdiction. In either case, federal plaintiffs with ripe federal claims are entitled to have those claims decided under federal law. As the Second Circuit held:

> "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims."

Santini, 342 F.3d at 128, quoting *England*, 375 U.S. at 415.

[1] The City also argues that *Pullman* and *Williamson County* are different because the ripeness requirement of *Williamson County* is rooted in the Fifth Amendment instead of prudential federalism principles. Resp. Brf. 21-22; but see *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-734 (1997) (*Williamson County* is based on "prudential ripeness principles" and establishes "two independent prudential hurdles"). Whether true or not, however, this case does not turn on that issue. Here, as in *Pullman* cases, the Field Brothers were required to proceed in state court before they were permitted to litigate their federal constitutional claims. As the Second Circuit concluded, there is no "meaningful" distinction between *Pullman* and *Williamson County*. *Santini*, 342 F.3d at 129.

Indeed, nothing in this Court's *Williamson County* opinion even suggests that the outcome of state compensation procedures *could* preclude a ripe federal claim. *Williamson County*, 473 U.S. at 185, 186, 194-195, 197, 200; *DLX, Inc. v. Kentucky*, 381 F.3d 511, 523 n. 9 (6th Cir. 2004) (the Ninth's Circuit's rule is "a result clearly not contemplated by the Court in *Williamson County*"). As the Second Circuit concluded, such a result would be flatly inconsistent with this Court's decision in *Williamson County*:

> It would be both ironic and unfair if the very procedure that the Supreme Court required [Takings plaintiffs] to follow before bringing a Fifth Amendment takings claim -- a state court-inverse condemnation action -- also precluded [them] from ever bringing a Fifth Amendment takings claim.

Santini, 342 F.3d at 130.

In sum, when this Court decided *Williamson County*, it was well aware of both the Full Faith and Credit Act and its own decision in *England*. This Court should now instruct the Ninth Circuit that the Field Brothers' federal constitutional claims must be decided on the merits.

B. The City's Remaining Arguments Merely Point out the Inherent Costs of Permitting Two Separate Proceedings, Which this Court Accepted When it Decided *Pullman* and *Williamson County*

The City's other arguments are not doctrinal. The City points out the inherent costs of any judicial doctrine that authorizes two separate proceedings. In the process, the City argues that the Field Brothers have sought delay in this litigation, and that the costs of defending two proceedings

harms the cities. The City's arguments could be relevant only if the City argued that *Williamson County* should be reversed. But, the City vehemently opposes this Court's reconsideration of *Williamson County*. Resp. Brf. 10 n. 13. As outlined below, the City's arguments are not only pointless. They are false.

1. The City's Observations that Other Bodies of Federal Law Do Not Present the Same Issues as *Williamson County*'s Rule Permitting Two Proceedings Merely Point Out the Obvious Costs That Were Fully Considered by this Court Long Ago

Only plaintiffs subject to *Pullman* or *Williamson County* are required to pursue state court claims before they can pursue their federal claims. The City, has uncovered three other bodies of law that it claims are analogous because the plaintiffs are required to proceed in state court even though they have federal claims: state tax, *Rooker-Feldman*, and *Burford* abstention cases. Resp. Brf. 28 n. 20.

The City's proposed analogy does not even address the issues in this case. As the City admits, in all of those cases, plaintiffs are entitled to "press [their] federal constitutional claims" in state court and are "subject [ ] to review by this Court." Resp. Brf. 28 n. 20. Accordingly, there is no need for an exception to normal res judicata rules because those plaintiffs are entitled to only one litigation.

Here, the Field Brothers raise questions that may be presented only by *Pullman* and *Williamson County* plaintiffs. The Field Brothers' ripe constitutional claims have never been considered on the merits. The California courts were given the opportunity to moot the Field Brothers' federal claims by providing compensation under California law, but were not

permitted to decide the federal claims.[2] The contrast should have been clear to the City before it offered the argument. Plaintiffs in state tax, *Rooker-Feldman*, and *Burford* abstention cases are entitled to have their federal claims considered on the merits in the state courts, and, if necessary, are entitled to this Court's review after a final state court determination of the federal claims.

The Field Brothers ask for nothing more. Here, no court in any jurisdiction has applied federal law to decide the Field Brothers' ripe constitutional claims and, if the Ninth Circuit's decision is affirmed, the federal courts will have no jurisdiction over such claims in any future case.

2. The Field Brothers Followed *Williamson County*'s Procedures: Their Actions Provide No Reason to Reconsider Their Right to a Full Merits Determination of Their Constitutional Claims

The City argues that the Field Brothers committed procedural errors, claiming that they should have submitted just their state administrative mandate claim (and not their state law compensation claims) to the state courts, and that they failed to reserve all of their federal Takings claims in the state courts. Resp. Brf. 22 n. 15. The City waived that procedural argument

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[2] The City does cite to three state court cases holding that state compensation claims and federal Takings claims can be considered simultaneously in state court. Resp. Brf. 25. Those cases, however, violate *Williamson County*'s holding that federal Takings claims may not be brought until the state compensation remedy has been denied. Moreover, the City's reliance on those cases is directly contrary to its repeated assertion that federal Takings claims do not accrue until the state courts have denied compensation. Resp. Brf. 21, 24.

by not raising it in opposition to the petition for certiorari. S. Ct. R. 15.2 (objections based on proceedings below waived unless called to the Court's attention in the brief in opposition); *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-816 (1985) (same). Moreover, the City did not make that argument in its opposition to the petition for certiorari for a good reason. As outlined below, the City's new argument is meritless.

The Ninth Circuit dismissed as unripe the Field Brothers' facial Takings claim to the extent it was based on the economic viability test, and all of their as-applied claims on any Takings theory. *San Remo I*, Resp. Brf. App. 9a, 10a. After that decision, the Field Brothers were required to bring all of their state law compensation claims in state court. In the state court, the Field Brothers reserved all of their federal Takings claims. J.A. 126-127 (reserved § 1983 claim in state court complaint incorporated all allegations of the state law compensation claims, based on facial and as-applied theories); Pet. App. 10a, 67a-68a (court of appeals and district court found that the Field Brothers explicitly reserved their right to litigate their federal claims).

That is a complete answer to the City's procedural argument. The only possible explanation for the City's argument is that it misconstrues the Field Brothers' as-applied Takings claim as three separate claims -- under the substantial advancement, economic viability, and *Penn Central* tests -- and that each required a separate reservation of rights. This Court has already held, however, that the three tests are merely separate theories supporting a single as-applied Takings claim. See *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (arguments that an ordinance was a physical and regulatory taking "are not separate *claims*," they are "separate arguments in support of a single claim -- that the ordinance effects an unconstitutional taking").

The City also blames the Field Brothers for their 15-year saga, portraying them as litigants who "snatched delay from the jaws of defeat." Resp. Brf. 2. Although the City's assertion does not seem to have any legal point, the Field Brothers note that they were simply satisfying the requirements of *Williamson County*. At each stage of the proceedings in the federal courts, however, the City argued that the Field Brothers should never receive a hearing on the merits of their federal claims. As the City knew, its ordinance and administrative actions could not withstand scrutiny by a federal court under the Fifth Amendment. Pet. 10-18; J.A. 65.

In sum, the City's attacks on the Field Brothers' conduct are entirely misdirected. The record shows that no Takings plaintiff is more entitled to consideration of their ripe constitutional claims.

3. The City's Argument That *Williamson County* Is Costly to Cities Is Hardly an Answer to the Field Brothers' Right to Have Their Ripe Constitutional Claims Heard and Is, in Any Event, False

The City's final argument concerning the costs of litigating in two proceedings unwittingly shows why it argues against the holding of *Williamson County*, but never asks this Court to overrule the decision. The practical reality facing Takings plaintiffs is that *Williamson County*'s two-proceeding requirement helps cities defeat meritorious Takings claims. No litigant wants to run the gauntlet that the Field Brothers ran. For every plaintiff like the Field Brothers, there are hundreds who surrendered rather than face years of litigation.

The burden of *Williamson County* falls much harder on Takings plaintiffs than on local governments. As Justice William Douglas explained, a doctrine that requires two rounds

of litigation makes "it likely that litigants seeking the protection of the federal courts for assertion of their civil rights will be ground down slowly by the passage of time and the expenditure of money in state proceedings, leaving the ultimate remedy . . . an illusory one." *England*, 375 U.S. at 436-437 (dissenting and arguing that *Pullman* should be overruled). As this twelve-year litigation illustrates, only plaintiffs with compelling federal Takings cases will even attempt to challenge their cities.

In any event, whatever the cost to cities, the Field Brothers are entitled to consideration of their ripe constitutional claims. The City's complaint about the high cost of defending its unconstitutional exactions is hardly worthy of this Court's attention.[3]

II. UNDER CALIFORNIA LAW, A DECISION UNDER STATE LAW THAT THE FIELD BROTHERS' COMPLAINT DID NOT STATE A CLAIM FOR COMPENSATION HAS NO PRECLUSIVE EFFECT ON THE FIELD BROTHERS' FEDERAL TAKINGS CLAIMS

The threshold premise of the City's argument that the Field Brothers' federal claims are precluded under the Full Faith and Credit Act is indefensible. Under California law, the determination that the Field Brothers did not state a claim under California's compensation law is entitled to no preclusive effect in federal court. Not surprisingly, the City consigns its defense of the Ninth Circuit's preclusion decision to a footnote. Resp.

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[3] Indeed, the City will not pay those legal costs in this case. Under a very recent amendment to the Hotel Ordinance, the costs will be paid from the unconstitutional exactions imposed on hotel owners who could not afford to challenge the City's actions. San Francisco Ordinance No. 133-05, adding § 41.13(f).

Brf. 18 n. 11. In that footnote, the City argues that the Ninth Circuit properly applied California law of issue preclusion, but cites cases in which the state courts determined that the first judgment decided the "identical issue." *Id.*, citing *Lumpkin v. Jordan*, 49 Cal.App.4th 1223, 1231, 57 Cal.Rptr.2d 303, 307-308 (1996); *Calhoun v. Franchise Tax Board*, 20 Cal.3d 881, 884, 574 P.2d 763, 765 (1978).

But, in this case, the Ninth Circuit did not find -- and could not find -- that state compensation law and federal Takings law are identical. See Pet. 10-18 (explaining differences between federal and state law on the merits of the Field Brothers' Takings claims). Instead, the Ninth Circuit precluded the Field Brothers' federal constitutional claim because it found that California law and federal law were "equivalent." *San Remo III*, Pet. App. 16a, 17a. That test has no basis in California law. Pet. Brf. 19-20. The test is whether the California Supreme Court decided an "identical issue." *Lumpkin*, 49 Cal.App.4th at 1231, 57 Cal.Rptr.2d at 307-308.

Rather than defend the Ninth Circuit's alternative formulation -- the "equivalent determination" test -- the City tries to muddy the issue further by stating six alternative tests that also have no basis in California law. Resp. Brf. 10, 13, 14, 15, 18, 22. By arguing that federal law is "largely coextensive," "congruent," "substantially identical," provides an "adequate forum," has no "material differences," and is "analogous," the City apparently hopes that no one will notice that none of these formulations -- including the Ninth Circuit's -- even arguably satisfies California's "identical issue" test.

Finally, the City claims the Field Brothers' argument that the Ninth Circuit's decision was wrong under California law of issue preclusion is beyond the scope of the petition for certiorari. Resp. Brf. 18 n. 11. But, the Field Brothers' petition

does ask whether their claim is barred by issue preclusion. This case is the same as *Migra*, where this Court decided that there is no blanket exempt from issue preclusion for Section 1983 cases, but remanded the claim because it was unclear whether the lower courts had applied state or federal issue preclusion law. *Migra v. Warren City School District Board*, 465 U.S. 75, 87 (1984). If necessary to reach this state law issue, the Field Brothers deserve no less.

In sum, even the City's threshold argument is false. There was no reason -- ever -- to deny the Field Brothers' right to have their ripened constitutional claims considered in full by the district court.

CONCLUSION

The City violated its constitutional responsibilities when it imposed a $567,000 exaction on the Field Brother as a "permit condition" to continue their decades-long and duly-licensed operation of the San Remo Hotel. The Field Brothers have a right to prove it. This Court should remand this case to the district court for a full determination of the merits of the Field Brothers' federal claims.

Dated: March 21, 2005.

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(16)

No. 04-340

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IN THE

SUPREME COURT OF THE UNITED STATES

SAN REMO HOTEL, L.P., THOMAS FIELD, ROBERT FIELD, AND T & R INVESTMENT CORP.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE HONORABLE STEVE CHABOT, CHAIR, SUBCOMMITTEE ON THE CONSTITUTION, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES IN SUPPORT OF PETITIONERS SAN REMO HOTEL, L.P., *ET. AL.*

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Page

TABLE OF CONTENTS

Interest of the Honorable Steve Chabot 1

Summary Of Argument 2

Argument:

This Court Should Resolve The Conflicting Interpretations Of *Williamson County* In A Manner That Restores The Right Of Property Owners To Pursue Taking Claims In Federal Court, And Provides Congress With Greater Guidance Regarding The Supreme Court's Understanding Of Constitutional Protections Of Property Rights 3

Conclusion 8

TABLE OF AUTHORITIES

Cases:

City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997) 6, 7

City of Monterey v. Del Monte Dunes, 526 U.S. 697 (1999) 3, 5

Reahard v. Lee County, 30 F.3d 1412 (11th Cir. 1994) 5

Santini v. Connecticut Hazardous Waste Management Service, 342 F.3d 188 (2d Cir. 2003), *cert. denied*, 73 U.S.L.W. 3211 (2004) 5, 6

Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) ..... *passim*

Page

Federal Statutes:

28 U.S.C. §1441(a) 4

Other:

H.R. Rep. No. 106-518 . . . . . 4, 5

J. Delaney and D. Desiderio, "Who Will Clean Up the 'Ripeness Mess'? A Call for Reform So Takings Plaintiffs Can Enter the Door of the Federal Courthouse," 31 Urb. Law. 195 (1999) 4

G. Overstreet, "The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Decisions," 10 J. Land Use & Envtl. L. 91 (1994) 4

BRIEF OF THE HONORABLE STEVE CHABOT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS SAN REMO HOTEL L.P., *ET AL.*

The Honorable Steve Chabot, Chair of the Subcommittee on the Constitution of the Judiciary Committee of the U.S. House of Representatives, has received the consent of the parties to file this brief as *amicus curiae* through blanket letters of consent filed with the Clerk of the Court.[1]

INTEREST OF THE HONORABLE STEVE CHABOT, CHAIR OF THE SUBCOMMITTEE ON THE CONSTITUTION OF THE JUDICIARY COMMITTEE OF THE U.S. HOUSE OF REPRESENTATIVES, AS *AMICUS CURIAE*

The jurisdiction of the House Subcommittee on the Constitution includes the constitutional protection of private property rights. It is with an appreciation of the gravity of this appeal that Chairman Chabot submits this brief to respectfully urge the Court to reverse the decision of the Ninth Circuit in a manner that will restore the right of property owners to have Fifth Amendment taking claims adjudicated on the merits in the federal courts.

---

[1] Pursuant to Rule 37.6 of the Court, counsel for the *amicus curiae* discloses that counsel for the parties did not take part in authoring this brief in whole or in part, and no person or entities other than the *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief.

The Subcommittee determined several years ago that this right is being severely restricted if not extinguished by the current application of the so-called "state court requirement" of this Court's 1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172.

SUMMARY OF ARGUMENT

Between 1997 and 2000, the Subcommittee on the Constitution of the Judiciary Committee of the U.S. House of Representatives inquired into the impact of this Court's requirement, formulated in 1985 in *Williamson County*, that property owners must pursue taking claims in State court before their Fifth Amendment taking claims may be adjudicated by a federal court. The Subcommittee determined that *Williamson County* has almost universally denied property owners the ability to have a federal court determine the merits of a Fifth Amendment taking claim. As a result, in 2000 the Subcommittee and the House of Representatives passed H.R. 2372, the Private Property Rights Implementation Act of 2000, in order to "simplify and expedite access to the Federal courts," but without altering substantive Fifth Amendment takings claim standards. Consistent with that bill, the *amicus curiae* respectfully submits that this Court should resolve the current conflict among the federal courts regarding access to the federal courts in a manner that eliminates or at least mitigates the obstacles that have resulted from *Williamson County* and provides guidance to Congress regarding the Supreme Court's understanding of the current scope of property rights protection.

ARGUMENT

THIS COURT SHOULD RESOLVE THE CONFLICTING INTERPRETATIONS OF *WILLIAMSON COUNTY* IN A MANNER THAT RESTORES THE RIGHT OF PROPERTY OWNERS TO PURSUE TAKING CLAIMS IN FEDERAL COURT, AND PROVIDES CONGRESS WITH GREATER GUIDANCE REGARDING THE SUPREME COURT'S UNDERSTANDING OF CONSTITUTIONAL PROTECTIONS OF PROPERTY RIGHTS.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court wrote: "[I]f a State provides an adequate procedure for seeking just compensation, the property owner *cannot* claim a violation of the Just Compensation Clause *until* it has used the procedure and been denied just compensation." *Id.* at 195 (emphasis added). This Court did not say that the federal taking claim co-existed from the outset with the state claim, or that the plaintiffs in *Williamson County* were simply in the wrong forum. Rather, the Court held that a property owner *cannot* bring a federal taking claim until that claim has been litigated in state court and just compensation has been denied. In 1999, this Court reaffirmed this interpretation, holding in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710 (1999), that a Fifth Amendment taking claim "does not accrue" until state law and procedures have been utilized.

Williamson County, however, has caused a crisis in procedural takings law, because federal judges have interpreted it so as to avoid addressing the merits of federal takings claims. From 1997 to 2000, the Subcommittee conducted an inquiry into the impact of *Williamson County* on the rights of property owners under the Fifth Amendment's Taking Clause. The Subcommittee was provided with credible research that in 94 percent

of all takings cases litigated between 1983 and 1988,[2] and in 83 percent of the takings claims initially raised in the federal district courts from 1990 to 1998, the federal court never reached the merits of the property owner's claim of a taking without just compensation.[3] Of those property owners who could afford to appeal their cases through the state courts and then proceed in federal court, 64 percent still failed to have their claims resolved on the merits. Moreover, in that small portion of appellate cases where a federal court found a takings claim to be procedurally ripe *and* addressed the merits, it took property owners "on the average, 9.6 years to have an appellate court reach its determination."[4] And these statistics do not address the low income or middle class property owners who, in the face of the expensive procedural challenges that stand between them and a federal forum on the merits of their federal civil rights claims, are too intimidated to even start down the long road to a hearing on the merits in federal court.

During the 106th Congress, Representative Chabot's predecessor as Chair of the House Subcommittee on the Constitution, the Hon. Charles Canady, was the lead sponsor of H.R. 2372,[5] the Private Property Rights

[2] *See* H.R. Rep. No. 106-518, at 10 *citing* G. Overstreet, "The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Decision," 10 J. Land Use & Envtl. L. 91, 92 n.3 (1994).

[3] *See ibid, citing* J. Delaney and D. Desiderio, "Who Will Clean Up the 'Ripeness Mess'? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse," 31 Urb. Law. at 202-231 (1999), at 196.

[4] *Ibid.*

[5] 106th Cong. (2d. Sess. 2000).

Implementation Act of 2000. Among other things, H.R. 2372 was designed to address the suppression of individuals' defenses to property rights violations by clarifying and simplifying the procedures governing federal property rights claims in federal court. Most significant to this case, H.R. 2372 would have removed the requirement that property owners litigate their federal takings claims in state court first, in order to ensure that property owners like the Petitioners in this case have a meaningful opportunity to have the federal courts decide their federal takings claims. On March 16, 2000, H.R. 2372 passed the House of Representatives by a vote of 226-182, with Chairman Chabot's support.

The Judiciary Committee's 2000 Report focused precisely on the consequences of *Williamson County* that underlie the instant appeal. The Report discussed the lengthy and expensive litigation required to pursue a taking claim through the state and then federal courts: for example, 14 years in *Del Monte Dunes,* and 13 years in *Reahard v. Lee County,* 30 F.3d 1412 (11th Cir. 1994).[6] The Committee also took note of the application of claim and issue preclusion defenses to bar federal taking claims.[7] The Report concluded: "The effect of the reasoning of these cases is that many property owners end up with *no opportunity* to have their Federal constitutional claims heard in Federal court."[8]

This appeal and the Second Circuit's conflicting decision in *Santini v. Connecticut Hazardous Waste Management Service,* 342 F.3d 118 (2d Cir. 2003), *cert. denied,* 73 U.S.L.W. 3211 (2004), are only the two

[6] *Ibid.* at 6.

[7] *Ibid.* at 8.

[8] *Ibid.* at 9.

most recent cases that illustrate the procedural crisis that has resulted from the *Williamson County* state court requirement and the concerns that prompted H.R. 2372. The *San Remo* case is now in its eleventh year of litigation, without a federal court having ruled on the Petitioners' Fifth Amendment takings claim. In *Santini*, the Second Circuit in 2003 became the first federal court to address the merits of plaintiffs' federal taking claim, which arose from events that occurred from 1991 to 1993. Even then, the Second Circuit, in allowing Santini to proceed and allowing Second Circuit litigants, henceforth, to reserve their federal claim during state court proceedings, effectively affirmed that Santini had been *properly required* to proceed through six years of state court litigation before his federal claim accrued and could even be pursued in federal court.

Thus, these two cases highlight the two consequences of the *Williamson County* state court requirement that have operated together to deny property owners their rights under the Takings Clause of the Fifth Amendment: the length of time in state court necessary to ripen the federal claim, and the property owner's inability to access the federal courts once the state court litigation has terminated.

When inquiring into *Williamson County* and crafting H.R. 2372, the Subcommittee also became aware of the inconsistency between *Williamson County* and *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). In *City of Chicago*, this Court held that when constitutionally aggrieved landowners properly file their takings actions in state courts, municipal defendants may remove the cases to federal court. That decision relied on 28 U.S.C. §1441(a), which permits removal of state court actions to federal courts only

where the plaintiff could have initially filed the action in federal court. *Williamson County* and *City of Chicago* are thus irreconcilable: if a municipality may remove a federal taking claim to federal court, then takings plaintiffs *must be allowed* to bring their claims in federal court from the start.

As a result, subsumed in this appeal is a question of great concern to Congress and to Chairman Chabot by virtue of his oversight responsibilities: Does this Court's decision in *City of Chicago* allow plaintiffs to bring their federal takings claims in federal court initially? If so, Congress may not have to pursue federal legislative solutions to the current procedural crisis.

This procedural confusion has left the scope of Fifth Amendment protection of property rights unclear and undetermined, and so has impeded Congress from examining what if any other procedural clarifications or amendments are warranted. Resolution of the conflicting interpretations of *Williamson County* will aid Congress, the Subcommittee on the Constitution, and the Judiciary Committee in understanding its opportunities and obligations to protect the constitutional rights of property owners.

CONCLUSION

This Court should resolve the conflicting interpretations of the *Williamson County* state court requirement in a manner that will restore the rights of property owners to have a federal court adjudicate their Fifth Amendment taking claims and will provide guidance to Congress regarding the Supreme Court's understanding of the scope of constitutional protection of property rights.

Respectfully submitted,

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Petitioners,

v.

CITY AND COUNTY OF
SAN FRANCISCO, CALIFORNIA, *et al.*,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF COMMUNITY RIGHTS COUNSEL, CALIFORNIA STATE ASSOCIATION OF COUNTIES, LEAGUE OF CALIFORNIA CITIES, AND AMERICAN PLANNING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. A Federal Takings Claim Against a State or Local Government Does Not Exist Until the State Courts Deny Just Compensation	5
II. San Remo's Effort to Secure Two Forums for Its Takings Claim Is Barred By the Full Faith and Credit Act, This Court's Case Law, and Fundamental Principles of Comity, Federalism, and Judicial Economy	16
A. San Remo Is Not Entitled to Two Bites at the Litigation Apple	17
B. Giving Takings Claimants Two Bites at the Apple Would Give Developers an Unfair Advantage in Dealing with Local Officials	23
III. *Williamson County* Should Not Be Overruled	26
CONCLUSION	28

TABLE OF AUTHORITIES

Page

CASES

Allen v. McCurry, 449 U.S. 90 (1980) ..... *passim*

Bakken v. City of Council Bluffs, 470 N.W.2d 34 (Iowa 1991) 12

Brown v. Legal Found. of Wash., 538 U.S. 216 (2003) 1

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 8, 26

Dodd v. Hood River County, 136 F.3d 1219 (9th Cir. 1998) 14, 15

Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995) 13

Dolan v. City of Tigard, 512 U.S. 374 (1994) 14, 17

Drake v. Town of Sanford, 643 A.2d 367 (Me. 1994) 12

FCC v. Florida Power Corp., 480 U.S. 245 (1987) 9

Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299 (11th Cir. 1992) 13

Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003) 11

Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275 (4th Cir. 1998) 13

Gulf Power Co. v. United States, 187 F.3d 1324 (11th Cir. 1999) 9, 10

Hudson v. Palmer, 468 U.S. 517 (1984) 7

TABLE OF AUTHORITIES – Continued

Page

Impink v. City of Indianapolis, 612 N.E.2d 1125 (Ind. Ct. App. 1993) 12

Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) 19, 20, 21

Lingle v. Chevron U.S.A. Inc. (U.S. No. 04-163) 15

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 10

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 11

MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) 9

Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984) 21

Montana v. United States, 440 U.S. 147 (1979) 21

Ohio v. Reiner, 532 U.S. 17 (2001) 11

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 1, 11

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 15

Pennsylvania v. Muniz, 496 U.S. 582 (1990) 11

Preseault v. ICC, 494 U.S. 1 (1990) 7-8

Qwest Corp. v. United States, 48 Fed. Cl. 672 (2001) ... 10-11

River Park, Inc. v. City of Highland Park, 23 F.3d 164 (7th Cir. 1994) 23

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 6, 7

Santini v. Connecticut Haz. Waste Mgmt. Serv., 342 F.3d 118 (2d Cir. 2003) 13

Stone v. Powell, 428 U.S. 465 (1976) 18

TABLE OF AUTHORITIES – Continued

Page

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 8

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) 1

Thornton v. United States, 124 S. Ct. 2127 (2004) 26

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138 (1984) 11

United States v. Cors, 337 U.S. 325 (1949) 10

United States v. John J. Felin & Co., 334 U.S. 624 (1948) 10

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 7

University of Tennessee v. Elliott, 478 U.S. 788 (1986) 19, 20, 21

Untracht v. West Jersey Health System, 803 F. Supp. 978 (1992) 12

Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) ..... *passim*

Wisconsin Central Ltd. v. Public Serv. Comm'n of Wisc., 95 F.3d 1359 (7th Cir. 1996) 10

Yee v. City of Escondido, 503 U.S. 519 (1992) 15, 26

STATUTES

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e, *et seq.* 19

Full Faith and Credit Act, 28 U.S.C. § 1738 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Pole Attachment Act, 47 U.S.C. § 224 9

Tucker Act, 28 U.S.C. § 1491 ..... 3, 6, 27

OTHER AUTHORITIES

Jerry L. Anderson & Erin Sass, *Is the Wheel Unbalanced? A Study of Bias on Zoning Boards*, 36 Urb. Law. 447 (2004) 24

Eliza Newlin Carney, *Power Grab*, Nat'l J., Apr. 11, 1998 24

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TABLE OF AUTHORITIES – Continued

Page

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S. Rep. No. 105-242 (1998) (minority views) 24

6 Julius L. Sackman, Nichols on Eminent Domain (3d ed. 2002) 9

INTEREST OF THE *AMICI CURIAE*[1]

Community Rights Counsel is a nonprofit, public interest organization that assists government officials in defending against constitutional challenges to federal, state, and local protections. It has filed *amicus* briefs with this Court and federal and state courts across the country in many regulatory takings cases, including *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003), *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

The California State Association of Counties (CSAC) is a nonprofit corporation, with membership consisting of all 58 counties in the State of California. CSAC sponsors a Litigation Coordination Program administered by the County Counsels' Association of California and overseen by the Association's Litigation Overview Committee, composed of county counsel throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties in California.

The League of California Cities is an association of 476 cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, which is composed of 24 city attorneys representing all 16 divisions of the League from all parts of the State. The committee monitors appellate

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[1] Counsel for the parties did not author this brief in whole or in part. No person or entity other than the *amici* made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters of blanket consent have been filed with the Clerk.

litigation affecting municipalities and identifies those cases that are of statewide significance.

The American Planning Association (APA) is a non-profit public interest and research organization founded in 1978 to advance the art and science of planning at the local, regional, state, and national levels. It represents more than 37,000 practicing planners, officials, and citizens involved, on a day-to-day basis, in formulating and implementing planning policies and land use regulations. The organization has 46 regional chapters, as well as 19 divisions devoted to specialized planning interests. The APA's members work for development interests as well as state and local governments.

The question presented involves the intersection of the federal Full Faith and Credit Act, 28 U.S.C. § 1738, with *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). As organizations that represent government officials and planners, *amici* have a strong interest in ensuring that state and local governments retain their ability to regulate property to promote public health, safety, and welfare. Their ability to do so would be significantly constrained if takings claimants were allowed, in contravention of the Full Faith and Credit Act, to relitigate issues of law and fact already fully litigated in state courts.

SUMMARY OF ARGUMENT

1. To clarify the issues presented in this case, this Court first should reaffirm that when a landowner seeks compensation in state court as required by *Williamson County*, it may do so only under state law because no federal takings

claim exists when the landowner files in state court. In the words of *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195.

The *Williamson County* Court rested this analysis on the language of the Just Compensation Clause and the very nature of the constitutional right. It also drew from parallel doctrines regarding the need to pursue statutory remedies prior to filing a federal takings claim against the United States under the Tucker Act, as well as requirements to pursue post-deprivation remedies under the Due Process Clause. Although certain takings cases have reached this Court on appeal from state court rulings on federal takings claims, the parties in those cases did not question whether the federal claim was properly filed in state court, and thus this Court had no occasion to address the issue.

The first principles articulated in *Williamson County* have direct consequences for the application of the Full Faith and Credit Act. Because no federal takings claim against a state or local official exists until the state court denies compensation under state law, claim preclusion generally would not apply once the *Williamson County* state-compensation requirement is fulfilled. As a result, there is no need for so-called "*England* reservations" to protect federal takings claims from claim preclusion.

The Full Faith and Credit Act requires the application of state issue preclusion law to matters resolved in state court. But a landowner may return to federal court to argue that the federal Constitution is more protective than

state law. This process ensures that federal courts, including this Court, remain the ultimate arbiter of the scope of federal takings law.

2. San Remo argues that the Full Faith and Credit Act unfairly leaves it without an unfettered opportunity to litigate its federal takings claims in federal court. But it fails to reconcile this argument with a series of cases where this Court, following the mandate of the Full Faith and Credit Act, has applied preclusion even where the result is to deprive a federal claimant of a federal forum. In *Allen v. McCurry*, 449 U.S. 90 (1980), the Court explicitly rejected San Remo's argument "that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court." *Id.* at 103.

Cases governing the application of the Full Faith and Credit Act to federal claims regarding workplace discrimination reaffirm that preclusion principles promote essential principles of repose, federalism, judicial economy, and comity between state and federal courts. San Remo has failed altogether to offer any plausible explanation as to why state judges would treat property owners unfairly.

In many communities, the playing field for land use disputes already is tilted in favor of developers and other potential takings claimants. Pro-development professionals serve in disproportionate numbers on planning and zoning boards. Developers commonly use litigation, or the mere threat of litigation, as a tool for advancing their interests in land use negotiations. Granting developers and other takings claimants two bites at the apple, in contravention of the Full Faith and Credit Act, would unfairly shift the playing field further to their advantage.

3. Issues concerning the continued viability of *Williamson County*'s longstanding, repeatedly reaffirmed state-compensation requirement are not raised in San Remo's petition or merits brief. Addressing them without adequate notice and briefing would be fundamentally unfair to municipalities and the public at large.

ARGUMENT

I. A Federal Takings Claim Against a State or Local Government Does Not Exist Until the State Courts Deny Just Compensation.

As a threshold matter, the Court should clarify the nature of the claim to be filed in state court under *Williamson County*. This issue pertains directly to the question presented, and reaffirmation of applicable first principles would greatly assist in elucidating precisely how the Full Faith and Credit Act applies to takings claimants that file in federal court after seeking just compensation in state court.

Simply put, when a takings claimant files in state court as required by *Williamson County*, the claimant may seek compensation *only* under state law. The claimant may not simultaneously file a federal takings claim in state court. As discussed below, this reading of the federal Just Compensation Clause and this Court's takings precedents differs markedly from that adopted by several federal appellate courts. We respectfully submit, however, that the analysis below is the only one consistent with this Court's longstanding pronouncements.

Williamson County itself could not be clearer on this point: "[I]f a State provides an adequate procedure for

seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." 473 U.S. at 195. This principle flows directly from the text of the Constitution: "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id.* at 194. In other words, the state-compensation requirement is compelled by the very nature of the protected right: "The nature of the constitutional right therefore requires that a property owner utilize [state] procedures for obtaining compensation *before* bringing a § 1983 action." *Id.* at 194 n.13 (emphasis added). The "special nature" of this right makes it different from other constitutional rights in a way that requires special treatment. *Id.* at 196 n.14.

This analysis makes plain that *Williamson County* does not send federal takings claimants to state court. Rather, it sends property owners who do *not* have a federal takings claim to state court, precisely because they do not have a federal claim. And their federal takings claim does not arise upon their mere appearance in state court. It arises, in the words of *Williamson County*, only after the landowner has "been denied just compensation" in state court under state law. *Id.* at 195.

In explaining this conclusion, *Williamson County* relied on cases requiring exhaustion of federal statutory compensation schemes prior to filing a federal takings claim under the Tucker Act, 28 U.S.C. § 1491. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), for example, the Court held that takings claimants challenging actions under the federal pesticide laws must first pursue compensation remedies under those laws as a "precondition" to a federal takings claim under the Tucker Act. *Id.* at 1018. Because

the Just Compensation Clause does not require payment in advance of, or even contemporaneously with, the taking, there is no cognizable federal constitutional claim against the United States unless the claimant is denied compensation under available statutory compensation procedures. *Id.* at 1016-19. Likewise, where a reasonably adequate compensation process exists in state court, "the property owner 'has no [federal] claim against the Government' for a taking" until that process is tested. *Williamson County*, 473 U.S. at 194-95 (quoting *Monsanto*, 467 U.S. at 1018 n.21).

Williamson County also drew an analogy to due process claims, observing that for those claims "the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the state fails to provide an adequate postdeprivation remedy for the property loss.'" *Williamson County*, 473 U.S. at 195 (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)). In the same way, because the Just Compensation Clause is satisfied by an adequate process for obtaining compensation, "the State's action here is not 'complete' [in the sense of causing constitutional injury] until the State fails to provide adequate compensation for the taking." *Williamson County*, 473 U.S. at 195.

This Court repeatedly has reaffirmed these bedrock principles in a way that shows that no federal constitutional violation occurs until the property owner seeks and is denied compensation through available procedures. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court stressed that "so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional." *Id.* at 128 (citing *Williamson County*). In *Preseault v. ICC*, 494

U.S. 1 (1990), the Court reiterated that if the government provides a process for obtaining just compensation, "then the property owner 'has no [federal] claim against the Government for a taking.'" *Id.* at 11 (quoting *Williamson County*). And in *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), the Court quoted with approval *Williamson County*'s central premise that "'if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.'" *Id.* at 734 (quoting *Williamson County*).

The Court's most recent reaffirmation of these principles came in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), where the majority insisted that a landowner "suffer[s] no constitutional injury from the taking alone" so long as a state court is available to provide just compensation. *Id.* at 710 (citing *Williamson County*); *accord*, *id.* at 714 (plurality) ("If the condemnation proceedings do not, in fact, deny the landowner just compensation, the government's actions are neither unconstitutional nor unlawful."). For this reason, a federal court "cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy." *Id.* at 721. This analysis was an integral part of the *Del Monte Dunes* ruling that because the statutory takings suit there "sounded in tort and sought legal relief, it was an action at law." *Id.* at 710-11.

These basic principles apply with equal force to direct condemnations. Many states have enacted "quick-take" statutes that provide for ouster of condemnees well before the award of compensation by state commissioners or state

court. *See* 6 Julius L. Sackman, Nichols on Eminent Domain § 24.10 (3d ed. 2002). If the Just Compensation Clause were deemed violated immediately upon the taking of property, these statutes would give rise to immediate federal court actions that could be used to circumvent established state remedies. As recognized in *Williamson County*, however, a violation of the Just Compensation Clause is not "complete" until the claimant is denied just compensation through available state court procedures.

The obligation to pursue available state-compensation procedures prior to filing a federal claim in federal court is not limited to relief available in state courts, but extends to administrative processes as well. The Court made this explicit in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986), stating that a federal court "cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation the responsible administrative body intends to provide." *Id.* at 350. The Congress, too, may authorize an administrative agency to determine just compensation in the first instance, subject to judicial review. The Federal Communications Commission, for instance, routinely determines compensation for physical takings of utility pole space authorized by the federal Pole Attachment Act, 47 U.S.C. § 224, a process that comports with the federal Constitution so long as adequate judicial review is available. *See Gulf Power Co. v. United States*, 187 F.3d 1324, 1331-37 (11th Cir. 1999) (citing *Williamson County*).[2]

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[2] An earlier version of the Pole Attachment Act did not mandate third-party access to utility poles and thus did not work a taking. *See FCC v. Florida Power Corp.*, 480 U.S. 245, 250-54 & n.8 (1987). In 1996, however, the Act was amended to require such access (*see Gulf Power*

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Cases involving administrative determinations do not raise the same preclusion issues as the instant case, but they reaffirm that property owners may not simply bypass established administrative processes and seek compensation directly in federal district court instead. Other statutes that authorize administratively determined compensation, subject to judicial review, would be gutted if property owners could simply sidestep the agency and sue for compensation in federal district court. These procedures are especially common during times of war.[3] Their pervasiveness is difficult to estimate, but to cite just one example, with respect to compelled utility interconnections many physical takings claims might be filed immediately in federal district court, without the benefit of an administrative record, if claimants could circumvent FCC and other federal administrative processes for the determination of just compensation.[4]

Co., 187 F.3d at 1327), resulting in the Eleventh Circuit ruling upholding the Act's statutory compensation scheme. *Id.* at 1331-37. Other courts agree that a legislature may authorize an administrative body to provide for just compensation in the first instance, subject to judicial review. *E.g.*, *Wisconsin Central Ltd. v. Public Serv. Comm'n of Wisc.*, 95 F.3d 1359, 1369 (7th Cir. 1996) (citing *Williamson County*).

[3] *E.g.*, *United States v. Cors*, 337 U.S. 325, 332 (1949) (upholding a compensation award by the War Shipping Administration for the taking of a steam tug because on the facts presented the legislative compensation formula was "coterminous" with the constitutional standard.); *United States v. John J. Felin & Co.*, 334 U.S. 624, 641-42 (1948) (upholding a compensation award by the Office of Price Administration for meat products seized by the government).

[4] *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (a government-compelled permanent physical occupation of property is a per se taking, no matter how small); *Qwest Corp. v. United States*, 48 Fed. Cl. 672, 693 (2001) ("[S]tate and federal courts alike view the implementation of mandatory access provisions requiring a telecommunications provider or utility to make space available on its

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We acknowledge that several takings cases have reached this Court on appeal from state court rulings that addressed federal takings claims. *E.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). On the reading of the Fifth Amendment presented in *Williamson County*, these cases might be viewed as anomalous because no federal claim should have been asserted in state court. Perhaps this Court's role in those cases could be explained by the heavy reliance on federal precedents by the state court rulings being reviewed.[5] But more to the point, the parties in these cases did not question whether the federal claim was appropriately filed in state court, and thus this Court had no occasion to address the issue. Cases that do not speak to the issue cannot justify abandoning the repeated holdings of *Williamson County* and other cases that directly address it. On the reading of the Fifth Amendment set forth in *Williamson County* and its progeny, review by this Court might occur after the state court ruling (*see* note 5), and would certainly be available after the claimant returns to federal court (*see* pp. 13-15, *infra*).

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premises for a competitor to affix its own equipment as constituting a physical taking under *Loretto* * * * .").

[5] *See Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 106 (2003) (U.S. Supreme Court "jurisdiction exists where federal cases are not 'being used only for the purpose of guidance' and instead are 'compel[ling] the result'" in state court) (citation omitted); *Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (per curiam) ("'[T]his Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law.'") (quoting *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 152 (1984)); *Pennsylvania v. Muniz*, 496 U.S. 582, 588 n.4 (1990) (although state court ruling expressly invoked the state constitution, Supreme Court could review the ruling because the state court explained that state and federal protections were identical).

Because *Williamson County* and similar rulings make clear that no federal constitutional violation exists until a state court denies just compensation, the state court claim required to be filed by *Williamson County* is a claim for compensation under state law, and only under state law. *See Bakken v. City of Council Bluffs*, 470 N.W.2d 34, 37 (Iowa 1991) ("Bakken's claim for a taking under section 1983 is not ripe for adjudication in this action until the remedy of inverse condemnation, or an equivalent state remedy, is first pursued.") (citing *Williamson County*); *Impink v. City of Indianapolis*, 612 N.E.2d 1125, 1127 (Ind. Ct. App. 1993) (where landowners filed both federal and state takings claims in state court, federal claim was premature under *Williamson County*); *Drake v. Town of Sanford*, 643 A.2d 367, 369 (Me. 1994) (same).

This straightforward reading of *Williamson County* has direct consequences for the application of preclusion principles under the Full Faith and Credit Act. Because no federal takings claim against a state or local official exists until the state court denies compensation under state law, claim preclusion generally would not apply once the *Williamson County* state-compensation requirement is fulfilled. Claim preclusion generally would not apply in these circumstances because state preclusion law typically is inapplicable to claims that had not accrued at the time of the prior litigation.[6] And because there is no claim

[6] *E.g.*, *Untracht v. West Jersey Health System*, 803 F. Supp. 978, 984 (1992) ("New Jersey claim preclusion does not apply to claims over which the initial New Jersey court lacked jurisdiction, i.e., to claims which could not have been brought * * *."), *aff'd*, 998 F.2d 1006 (3d Cir. 1993) (table); *see generally* Restatement (Second) of Judgments § 26(1)(c) (generally no claim preclusion if the initial court lacks subject matter jurisdiction to hear the claim).

preclusion, there is no need for so-called "*England* reservations" to protect federal takings claims from claim preclusion.

Unfortunately, several federal appellate courts have ignored this Court's teachings and assumed takings claimants may file federal takings claims in state court while they are fulfilling the *Williamson County* state-compensation requirement. This approach has resulted in an unnecessarily complicated system of *England*-like reservations in certain circuits.[7] A clear reaffirmation of *Williamson County*'s theoretical underpinnings in the instant case would remove this needlessly complex underbrush.

Notwithstanding the overheated rhetoric by San Remo and its *amici*, *Williamson County* does not create a "trap" (Pet. Br. 14) that forever "slams" the federal courthouse door on takings claimants (Home Builders Br. 17). To be sure, as explained in Section II below, the Full Faith and Credit Act requires the application of state issue preclusion law to matters litigated and resolved in state court. This issue preclusion would apply to factual findings, as well as legal conclusions to the extent the federal court determines that state and federal takings law are coextensive. But a landowner may return to federal court to argue that the federal Constitution is more protective than state law, a process that often involves a legal

[7] *See Santini v. Connecticut Haz. Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003) (establishing an *England*-like "Santini reservation"); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998) (*England* reservation might be available to takings claimants); *Dodd v. Hood River County*, 59 F.3d 852, 862 (9th Cir. 1995) (reservation is available to takings claimants to avoid claim preclusion); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1306 (11th Cir. 1992) (same).

analysis of federal takings law as comprehensive as a merits determination.

That is precisely what San Remo did here. Notwithstanding the California Supreme Court's rejection of heightened judicial scrutiny, San Remo returned to federal court to argue that federal takings law is more protective than California law. Specifically, regarding its claim that the law at issue does not substantially advance a legitimate state interest, San Remo argued that federal takings law subjects legislatively imposed fees to rough-proportionality review under *Dolan v. City of Tigard*, 512 U.S. 374 (1994). San Remo contended that because state and federal law are not equivalent regarding the application of *Dolan*, issue preclusion does not apply to its *Dolan* theory. The federal district and appeals courts gave this scope-of-*Dolan* argument as much consideration as they would have given if the *Dolan* issue had been presented to them in the first instance. After full deliberation, they ruled against San Remo, applying an analysis virtually indistinguishable from a merits determination, concluding that *Dolan* does not apply to legislatively imposed fees under federal takings law. Pet. App. 17a-21a, 44a-48a, 91a-94a. San Remo then petitioned this Court for *certiorari* on the *Dolan* issue, which was denied when the Court limited review to the procedural question presented. J.A. 129. To say that *Williamson County* slammed the federal courthouse door on San Remo is to ignore reality.

Other takings claimants have been treated in similar fashion. For example, in *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998), the Ninth Circuit applied issue preclusion as required by the Full Faith and Credit Act to a takings claimant that sought compensation in Oregon

state court and then returned to federal court to litigate its federal takings claim. In determining the appropriate scope of the issue preclusion, the Ninth Circuit considered whether federal takings law is more protective than Oregon takings law. Because Oregon takings law does not recognize a claim under the multi-factor test articulated in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), the Ninth Circuit ruled that federal takings law is more protective and that the claimant was entitled to a full hearing on the merits of its *Penn Central* theory of liability in federal court. *Dodd*, 136 F.3d at 1228-30. The *Dodd* court addressed the *Penn Central* claim on the merits and ultimately rejected it. *Id.*

Moreover, where a state court invokes federal precedent to resolve the state law takings claims, this Court retains the ability to review that determination directly. *See* note 5, *supra*. And under *Williamson County*, takings claimants are not required to file in state court at all where state-compensation procedures are inadequate. 473 U.S. at 194-95.[8]

* * *

[8] In *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Court held that in a facial challenge to a rent control ordinance alleging that the ordinance failed to substantially advance a legitimate state interest, the claimant need not seek rent increases to ripen the claim. *Id.* at 534. Because *Yee* came up through the California state courts, the Court had no occasion to consider whether a claimant bringing a facial "substantially advance" claim must seek relief in state court first, and any implication to the contrary in *Yee* would be dictum. If this Court were to rule in *Lingle v. Chevron U.S.A. Inc.* (U.S. No. 04-163) that there is no freestanding "substantially advance" theory of takings liability, the ruling would moot the question of whether such claims are subject to *Williamson County*.

In short, where a landowner alleges a taking by state or local officials, *Williamson County* requires the claimant to seek compensation in state court under state law, and no parallel federal takings claim may be filed in that proceeding. A federal takings claim does not arise until the claimant is denied just compensation in state court under state law. Reaffirmation of these first principles would clarify the law by eliminating concerns about claim preclusion and dispensing with the need for *England*-type reservations.

We show in the next section that, if the claimant files in state court, loses, and then files a federal takings claim in federal court, the federal Full Faith and Credit Act requires the application of state law on issue preclusion. If the Full Faith and Credit Act means anything, it means this lengthy litigation has finally run its course.

II. San Remo's Effort to Secure Two Forums for Its Takings Claim Is Barred By the Full Faith and Credit Act, This Court's Case Law, and Fundamental Principles of Comity, Federalism, and Judicial Economy.

Amicus Neumont warns this Court to anticipate a "chorus from respondents and their amici about how the state procedures requirement is a pillar of Western Civilization and how overruling it will usher in a new Dark Ages." Neumont Br. 23. But it is San Remo and its *amici* who are guilty of overplaying their rhetorical hand. San Remo cites unidentified "commentators" who describe *Williamson County* as "pernicious," "riddled with obfuscation and inconsistency," and "a Kafkaesque maze." Pet. Br. 16. *Amicus* Neumont accuses this Court of "fabricating the state procedures requirement" in *Williamson County* and

calls the case "a jurisprudential embarrassment." Neumont Br. 2, 4. *Amicus* Kottschade ridicules the application of *Williamson County* by the lower courts, calling it "a tragic-comic parody of law." Kottschade Br. 28.

It is nothing of the sort. *Williamson County*, as applied by the court below, is both straightforward and fair. Takings claimants must file their claims first in state court under state law. Where the state court provides a full and fair opportunity to litigate particular takings issues, claimants are not permitted to relitigate these issues in federal court.

San Remo's argument reduces to a single proposition: this framework unfairly leaves it without an unfettered opportunity to litigate its federal takings claims in federal court. As discussed above, San Remo *was* allowed to return to federal court to argue that federal takings law subjects legislatively imposed fees to the *Dolan* test. But more fundamentally, San Remo overstates its case in two basic respects. First, it fails to confront a series of cases where this Court, following the mandate of the Full Faith and Credit Act, has applied preclusion even where the result is to deprive a federal claimant of a federal forum. Second, San Remo ignores the unfairness of the outcome it proposes, which would give two bites at the apple to developers. We address each point in turn.

A. San Remo Is Not Entitled to Two Bites at the Litigation Apple.

San Remo and its *amici* assert that *Williamson County*, as applied by the lower court, has made takings claimants a "poor relation" to other federal claimants because they alone are denied an unfettered opportunity

to litigate their federal claim in a federal forum. Pet. Br. 15. But this Court has faithfully applied preclusion law even when the claimant was in a state forum involuntarily and where the result was to deprive a claimant of a federal forum altogether.

The leading example is *Allen v. McCurry*, 449 U.S. 90 (1980). Police allegedly violated McCurry's Fourth Amendment rights in the course of searching his apartment prior to his arrest. McCurry raised this violation in defending against a state criminal trial and his claim was upheld in part and rejected in part. He thereafter attempted to bring a § 1983 claim in federal court to obtain damages. McCurry argued against application of preclusion doctrines by asserting that, because he was forced into state court involuntarily, he was entitled to a federal forum for his federal constitutional claim.

This Court rejected McCurry's argument, finding it irreconcilable with the Full Faith and Credit Act. *Id.* at 99. The Court also rejected what lies at the heart of San Remo's argument here: the "generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court." *Id.* at 103. The Court held that the basis for this argument "cannot lie in the Constitution, which makes no such guarantee," *id.* at 103, and also cannot be rooted in "a general distrust of the capacity of the state courts to render correct decisions on constitutional issues." *Id.* at 105. Rather, the Court expressed its "emphatic reaffirmation * * * of the constitutional obligation of the state courts to uphold federal law, and its * * * confidence in their ability to do so." *Id.* (citing *Stone v. Powell*, 428 U.S. 465, 493-494 n.35 (1976)).

Those alleging discrimination in the workplace are subject to similar preclusion rules, as shown by *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982), and *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). *Kremer* and *Elliot* apply preclusion in the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, notwithstanding Congress's express concern with preserving a federal forum for victims of workplace discrimination. As the Court recognized in *Kremer*, Title VII "implemented the national policy against employment discrimination by creating an array of substantive protections and remedies which generally allows federal courts to determine the merits of a discrimination claim." 456 U.S. at 463. Nonetheless, in *Kremer*, Justice White, perhaps the Court's foremost nationalist during his time on the Court,[9] wrote for the Court that "traditional rules of preclusion, enacted into federal law" required preclusion even though the result was to deprive Kremer of a federal forum for his federal claims. *Id.* at 485.

Kremer, like San Remo, possessed a federal claim that he hoped to litigate in federal court. But like the Just Compensation Clause, Title VII routed Kremer first to a state forum. Specifically, Title VII requires that the Equal Employment Opportunity Commission refer charges of employment discrimination first to state administrative agencies with authority to provide relief. *Id.* at 469. A federal proceeding can begin only after affording the state agency the opportunity to resolve the complaint. *Id.*

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[9] *See generally* Martin S. Flaherty, *Byron White, Federalism and the "Greatest Generation(s)"*, 74 U. Colo. L. Rev. 1573 (2003).

After a New York administrative tribunal rejected Kremer's state law claims, he appealed the tribunal's ruling in the New York courts. After losing this appeal, he attempted to litigate his Title VII claim in federal court. The district court dismissed Kremer's case under the Full Faith and Credit Act, and this Court affirmed. *Id.* at 485.

The result in *Kremer* is strikingly similar to the result complained about by San Remo here. Kremer was forced into a state forum. After receiving a full hearing in state court, he was not permitted to get a second bite at the litigation apple in federal court. This result, the Court held, was compelled by the Full Faith and Credit Act, which, as stressed by Justice White throughout his opinion, is one of Congress's most enduring and important laws because it promotes "the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Id.* at 467 n.6 (quoting *Allen*, 449 U.S. at 96).

Elliott takes *Kremer* one step further. Like Kremer, Elliott pursued his employment discrimination claim first in a Tennessee administrative tribunal. Unlike Kremer, Elliott elected against a state court appeal and sued immediately in federal court, where he asserted federal claims under Title VII and other statutory and constitutional provisions. The question presented in *Elliott* was what, if any, preclusive effect should be given to the findings of the state administrative tribunal. The *Elliott* Court recognized that the Full Faith and Credit Act does not mandate preclusion with respect to "unreviewed findings of state administrative agencies," 478 U.S. at 793, but nevertheless concluded that Elliott's non-Title VII claims were precluded by the Tennessee administrative adjudication. The Court held the "parties' interest in avoiding the cost and vexation of repetitive litigation and

the public's interest in conserving judicial resources" mandated preclusion. *Id.* at 798.

Allen, *Kremer*, and *Elliott* expose a critical flaw at the center of San Remo's case. As these three cases illustrate, the desire of a federal claimant for a federal forum is frequently trumped by concerns of repose, comity, federalism, and judicial economy, and by the need to adhere to the Full Faith and Credit Act. *See also Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984) ("[I]t is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims."). In *Williamson County*, this Court ruled as a matter of constitutional law that takings claimants must first seek compensation in state court. Where a state court provides a takings claimant with a full and fair hearing, the federal Full Faith and Credit Act requires that this Court give those state rulings their full preclusive effect.

As *Elliott* demonstrates, even absent the mandates of the federal Full Faith and Credit Act, San Remo would bear a heavy burden in proposing that this Court waive application of issue preclusion in the context of a case litigated first in state court pursuant to *Williamson County*. As Justice Marshall wrote for the Court in *Montana v. United States*, 440 U.S. 147 (1979), preclusion "is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Id.* at 153. San Remo has offered this Court no compelling reason for waiving the application of this central and eminently sensible doctrine.

San Remo complains about being "consigned to the state courts." Pet. Br. 14. *Amicus* Kottschade goes further, strangely suggesting that the application of the Full Faith

and Credit Act here would "lead to a *sub rosa* resuscitation of the discredited 'interposition doctrine' that reared its head briefly in the wake of *Brown v. Board of Education.*" Kottschade Br. 8 n.5. But San Remo has not provided this Court with *any* evidence that property owners are systematically mistreated in state court.[10]

Indeed, San Remo has failed even to offer an explanation as to why state judges would be biased against claims by property owners or more hostile to property claims than their federal counterparts.[11] As Judge Easterbrook has recognized, this proposition defies common sense:

> Federal courts are not boards of zoning appeals. This message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their claims than are state judges. Why they should believe this we haven't a clue; none has ever prevailed in this circuit, but state courts often afford relief on facts that do not support a federal claim.

River Park, Inc. v. City of Highland Park, 23 F.3d 164, 165 (7th Cir. 1994).

[10] Pacific Legal Foundation (PLF Br. 15-16) cites a study concluding only that this Court's rulings are "not influencing state court judges to tilt their discretion toward property owners' interests." *See* Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on State Courts: Does the Supreme Court Matter?*, 6 Fordham Envtl. L.J. 523, 556 (1995). This is a far cry from proving a systematic state court bias against property owners. PLF's remaining sources (Br. 16) are critical of the treatment of property owners by California courts, but the best evidence on that issue is the treatment by the California courts of San Remo here, and neither San Remo nor its *amici* argue that the California courts failed to give San Remo a full and fair hearing.

[11] PLF speculates (Br. 16) that federal judges might be "more disposed to vindicate the exercises of property rights that do not benefit immediate neighbors." *Id.* But one could argue to the contrary that the political and community pressures bearing down on state judges make them more predisposed to the interests of powerful and wealthy landowners. In any event, PLF's musings do not come close to overcoming this Court's oft-stated trust of state courts to fairly adjudicate federal constitutional questions. *See Allen*, 449 U.S. at 105.

Even were there evidence that a particular state court had mistreated takings claimants, a federal court could address this inequity while remaining in full compliance with the Full Faith and Credit Act. As this Court explained in *Allen*, preclusion applies only where a litigant has "full and fair opportunity" to litigate in state court. 449 U.S. at 101. Thus, the *Allen* Court instructed lower courts not to apply preclusion where "state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim." *Id.*

But San Remo does not claim that the hearing it received in the California courts was unfair, nor could it. Instead, San Remo asserts that every claimant should get a full and fair hearing in state court and then, if it loses, another full hearing in federal court. As explained above, this result is prohibited by the Full Faith and Credit Act and the fundamental principles of comity, federalism, and judicial economy that underlie the Act.

B. Giving Takings Claimants Two Bites at the Apple Would Give Developers an Unfair Advantage in Dealing with Local Officials.

While San Remo and its *amici* imply that state agencies and state courts systemically mistreat developers and other property owners, the reality is exactly the opposite.

Pro-development professionals serve in disproportionate numbers on planning and zoning boards. *See* Jerry L. Anderson & Erin Sass, *Is the Wheel Unbalanced? A Study of Bias on Zoning Boards*, 36 Urb. Law. 447, 466 (2004). And developers have become adept at using litigation, and often just the threat of litigation, as a tool for advancing their interests.

Ninety percent of American municipalities have less than 10,000 people and cannot afford a full-time municipal lawyer. *See* S. Rep. No. 105-242, at 44-45 (1998) (minority views). For these municipalities, defending against a single takings suit by a wealthy developer can result in debilitating costs. For example, Hudson, Ohio, a community of 22,000, had to spend more than $400,000 in an ultimately successful effort to defend against a challenge to the city's growth management ordinance spearheaded by the Home Builders Association of Greater Akron. *See* Eliza Newlin Carney, *Power Grab*, Nat'l J., Apr. 11, 1998, at 798, 800.

Litigation costs for small communities have soared in recent years. The "'explosion in the non-traditional use of civil rights statutes – most important, section 1983 of the Civil Rights Act of [1871] – to include cases involving such areas as zoning and land development'" is a "driving factor" in these increased costs. Susan A. MacManus, *The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms*, 44 Syracuse L. Rev. 833, 836-840 (1993) (citation omitted).

Not surprisingly, the fear of big litigation bills alters the behavior of local officials. For example, a California Research Bureau study found that cities that have been sued for takings are twice as likely to report having

changed their regulatory behavior as those who have not been sued. *See* Daniel Pollak, *Have the U.S. Supreme Court's 5th Amendment Takings Decisions Changed Land Use Planning in California?*, 27 (California Research Bureau, 2000). The report concluded that "takings objections, litigation threats, and even lawsuits have become a common aspect of land use planning discussions." *Id.*

For small municipalities, a lawsuit in an often distant, unfamiliar, federal court represents an even greater threat to community interests and resources. To litigious developers, this means that the threat of a federal suit is a bigger club. This is at least part of the reason *amici* National Association of Home Builders (NAHB) asserted that federal bills intended to overrule *Williamson County* were its "main legislative initiatives" during the 105th and 106th Congresses. John J. Delaney and Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195, 195 (1999). The current Chief Executive Officer of the NAHB candidly called one such bill a much-needed "hammer to the head" of state and local officials. *See* Brody Mullins, *Property Takings Bill Set For House Fight*, National Journal's Congress-Daily AM (March 14, 2000).

Landowners deserve a fair forum and a full hearing for their constitutional claims. San Remo received its fair hearing already. To grant San Remo's request in this case would unfairly put two hammers to the heads of local officials.

III. *Williamson County* Should Not Be Overruled.

Evidently recognizing that the Full Faith and Credit Act requires application of issue preclusion here, certain *amici* supporting San Remo urge this Court to overrule *Williamson County*. Significantly, however, San Remo neither raised this issue in its Petition nor addressed it in its merits brief. As the Court observed in *Yee*, "it is the petitioner himself who controls the scope of the question presented. The petitioner can generally frame the question as broadly or as narrowly as he sees fit." 503 U.S. at 535. As in *Yee*, San Remo's failure to raise the issue should dispose of the matter.

Moreover, in the past this Court has not viewed issues regarding the soundness and viability of existing precedents to be fairly included within questions presented regarding the application of those precedents. *See Del Monte Dunes*, 526 U.S. at 704 ("declin[ing] the suggestions of *amici* to revisit [applicable] precedents" where the city did not challenge them); *Thornton v. United States*, 124 S. Ct. 2127, 2132 & n.4 (2004) (refusing to overrule established constitutional precedent governing automobile searches because the petitioner had not argued that prior precedent be limited).

We will resist the urge to rebut in comprehensive fashion the eristic arguments proffered by San Remo's *amici*, but we mention a few responses in summary fashion because they provide additional reasons not to address the issue at all. Briefly put, *Williamson County*'s state-compensation requirement is longstanding rule of law that has been repeatedly reaffirmed. It is based on controlling authorities extending back more than 100 years. 473 U.S. at 194. It is expressly predicated on the

text of the Just Compensation Clause. *Id.* Its analysis is drawn from, and inextricably intertwined with, parallel lines of authorities that govern cases brought under the Tucker Act (*id.* at 194-95) and the Due Process Clause (*id.*), and should not be revisited without full consideration of how changes would influence those lines of cases. Much of the academic literature agrees with the Court's reading of the Fifth Amendment articulated in *Williamson County*.[12] Finally, addressing the status of *Williamson County* at the eleventh hour in this case, without adequate notice, would be tremendously unfair to state and local officials and the public at large.

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[12] *E.g.*, Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 38, 73 (1995) (concluding that the state-compensation requirement is "based on the nature of the Fifth Amendment," and that changes to the requirement are ill-advised because federal courts are "busy enough," and state courts "can do a better job of evaluating local and state interests"); Max Kidalov and Richard H. Seamon, *The Missing Pieces of the Debate Over Federal Property Rights Legislation*, 27 Hastings Const. L. Q. 1, 3-4 (1999) (arguing that the state-compensation requirement is "an element of a cause of action for a violation of the Just Compensation Clause" and that "[t]he elimination of that requirement would change the substance of takings law"); Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under* Williamson County, 26 Ecology L. Q. 1 (1999) (agreeing that a "federal takings claim simply does not exist before the state inverse condemnation claim is resolved, and may not, therefore, be considered alongside the state claim in state court").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 04-340

IN THE

Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T & R INVESTMENT CORP.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF CONFERENCE OF CHIEF JUSTICES IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR RESOLVING THE ISSUE RAISED BY THE PETITION FOR *CERTIORARI*	4
II. ALLOWING DUPLICATIVE LITIGATION OF TAKINGS CLAIMS IN STATE AND FEDERAL COURT WOULD PRODUCE A SERIOUS WASTE OF JUDICIAL RESOURCES, UNDERMINE JUDICIAL COMITY, AND BE INCONSISTENT WITH THE POLICY FAVORING REPOSE	16
III. PETITIONERS ARE BARRED BY THE FULL FAITH AND CREDIT ACT FROM SEEKING TO RELITIGATE TAKINGS CLAIMS IN FEDERAL COURT	18
CONCLUSION	27

TABLE OF AUTHORITIES

FEDERAL AND STATE CASES — Page

Allen v. McCurry, 449 U.S. 90 (1980) 18, 19, 20, 25
Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003) 2
Clafin v. Houseman, 93 U.S. 130 (1876) 21
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 3, 17
DLX Inc. v. Kentucky, 381 F. 3d 511 (6th Cir. 2004) 25
Dodd v. Hood River County, 136 F.2d 1219 (9th Cir. 1998) 22
Dolan v. City of Tigard, 512 U.S. 374 (1994) 14
England v. Louisiana State Board of Medical Examiners, 374 U.S. 411 (1964) ..... *passim*
Federated Department Stores, Inc. v. Moietie, 452 U.S. 394 (1981) 17
First English Evangelical Lutheran Church v. City of Los Angeles, 482 U.S. 304 (1987) 23
Idaho v. Coeur D'Alene Tribe of Idaho, 521 U.S. 261 (1997) 21
Kowalski v. Tesmer, 125 S. Ct. 564 (2004) 17
Kremer v. Chemical Constriction Corp., 456 U.S. 461 (1982) 11, 18, 20
Lingle v. Chevron, U.S. 04-163 ..... 3, 5
Lockerty v. Phillips, 319 U.S. 182 (1943) 20
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 23
Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 14
Migra v. Warren City School District Board of Education, 465 U.S. 75 (1984) 19
Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 23
Pennsylvania v. Muniz, 496 U.S. 582 (1990) 22

TABLE OF AUTHORITIES—Continued

Page

Railroad Commission of Tex. v. Pullman Company, 312 U.S. 496 (1941) 8, 9, 10, 11, 26
Republican Party of Minnesota v. White, 536 U.S. 765 (2002) 3
Rooker v. Fidelity Trust Company, 263 U.S. 413 (1923) 17
Ruhrgas AG v. Marathon Oil Company, 526 U.S. 574 (1999) 17
San Remo Hotel v. City and County of San Francisco, 145 F. 3d 1095 (9th Cir. 1998) 5, 8, 11, 12
San Remo Hotel L.P. v. City and County of San Francisco, 27 Cal. 4th 643 (2002) 5
San Remo Hotel L.P. v. San Francisco City and County, 364 F. 3d 1008 (2004) 4
Sinclair Oil Corp. v. County of Santa Barbara, 96 F. 3d 401 (9th Cir. 1996) 8, 13
Stone v. Powell, 482 U.S. 465 (1976) 21
Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) ..... *passim*
Wilcox v. Consolidated Gas Company, 212 U.S. 19 (1909) 25
Yee v. City of Escondido, 503 U.S. 519 (1992) 6, 14

FEDERAL STATUTES

Full Faith And Credit Act, 28 U.S.C. § 1738 ..... *passim*

LEGISLATIVE MATERIALS

Private Property Rights Implementation Act, S. Rep. No. 105-242 (1998) 20

OTHER AUTHORITIES

Chief Justice's 2004 Year-End Report on the Federal Judiciary, January 1, 2005 16

TABLE OF AUTHORITIES—Continued

Page

Kathryn E. Kovacs, "Accepting The Relegation Of Takings Claims To State Courts: The Federal Courts' Misguided Attempts To Avoid Preclusion Under Williamson County, *Ecology Law Quarterly*, 1 (1999) 21

National Center For State Courts, *Examining The Work Of The State Courts* (2003) 16

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* CONFERENCE OF CHIEF JUSTICES IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE* [1]

The Conference of Chief Justices ("the Conference") was founded in 1949 to provide an opportunity for the highest judicial officers of the states to meet and discuss matters of

[1] The parties have consented to the filing of this *amicus* brief. No counsel for any of the parties authored any part of this brief, and no person or entity other than the counsel and the *amicus* submitting this brief has made any monetary contribution to the preparation or submission of this brief.

importance in improving the administration of justice, rules and methods of procedure, and the organization and operation of state courts and judicial systems, and to make recommendations and bring about improvements on such matters. Membership in the Conference of Chief Justices consists of the highest judicial officer of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the territories of American Samoa, Guam and the Virgin Islands. The Conference of Chief Justices is governed by a Board of Directors and has several standing, temporary and special committees to assist the Conference in meeting its objectives.

The mission of the Conference of Chief Justices, as adopted on February 23, 1995, is to improve the administration of justice in the states, commonwealths and territories of the United States. The Conference accomplishes this mission by the effective mobilization of the collective resources of the highest judicial officers of the states, commonwealths and territories to:

- develop, exchange, and disseminate information and knowledge of value to state judicial systems;
- educate, train and develop leaders to become effective managers of state judicial systems;
- promote the vitality, independence and effectiveness of state judicial systems;
- develop and advance policies in support of common interests and shared values of state judicial systems; and
- support adequate funding and resources for the operations of the state courts.

On a highly selective basis, the Conference of Chief Justices has in the past filed briefs *amicus curiae* in the Supreme Court in cases with significant implications for the administration of justice or directly affecting the state court systems, including *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

SUMMARY OF ARGUMENT

The Conference respectfully suggests that the Court consider, for several different reasons, dismissing the petition for *certiorari* as improvidently granted. Over the course of this litigation, this case has narrowed down to claims that the San Francisco housing and zoning ordinances effect a taking because they fail to substantially advance a legitimate state interest. However, in *Lingle v. Chevron*, No. 04-163, the Court has granted review to decide whether a substantially advances claim states a claim under the Just Compensation Clause at all, as opposed to a claim under the Due Process Clause. Because the preclusion rules applicable to this type of putative takings claim might not apply to more traditional takings claims based on adverse economic impact, this is an inappropriate vehicle for addressing the question in the petition for *certiorari*.

In addition, the premise of the issue presented in the petition—that petitioners were "required" to litigate their takings claims in state court—is not correct in this case. One of petitioners' primary arguments is that it would be "unfair" to bar them from relitigating their takings claims in federal court based on a prior state court judgment rejecting their claims when they were "required" to litigate the claims in state court against their will. Since the factual predicate of the argument is not met in this case, this is not a suitable vehicle for addressing the questioned presented.

In any event, the Court should reject petitioners' argument on the merits because allowing duplicative litigation of takings claims in state and federal courts would produce a serious waste of judicial resources, undermine judicial comity, and be inconsistent with the policy favoring repose.

The Full Faith and Credit Act generally bars relitigation in federal court of legal disputes already adjudicated in state court, and petitioners have identified no applicable exception to this principle in this case. Neither the Court's decision in *Williamson County* nor its decision in *England* supports petitioners' position that takings claimants should have the opportunity to litigate the exact same lawsuit twice, once in state court and then again in federal court.

ARGUMENT

I. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR RESOLVING THE ISSUE RAISED BY THE PETITION FOR *CERTIORARI*

The petition for *certiorari* presents the following question: "Is a Fifth Amendment takings claim barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal takings claim?" For several different reasons, this case is an inappropriate vehicle for resolving this question. Accordingly, the Conference respectfully suggests the Court consider dismissing this petition on the ground that the writ of *certiorari* was improvidently granted.

1. First, this case represents an inappropriate vehicle because it is doubtful whether the case involves a viable claim for relief under the Just Compensation Clause. Petitioners contend that San Francisco's Residential Hotel Unit Conversion and Demolition Ordinance and its North Beach Neighborhood Commercial District zoning ordinance effect a taking because they fail to "substantially advance" a legitimate state interest. *See San Remo Hotel, LLP v. San Francisco City and County*, 364 F.3d 1088 (9th Cir. 2004). [2]

[2] Petitioners initially filed suit in federal court alleging that San Francisco's regulations effected a taking both because they did "not substantially advance legitimate state interests," and because they denied petitioners "economically viable use of [their] hotel." *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1101 (9th Cir. 1998). The Ninth Circuit ruled that the latter claim was unripe under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985), because petitioners had not pursued available state procedures for obtaining compensation. Subsequently, before the California courts, petitioners essentially abandoned their denial of economic use claims. *See San Remo Hotel L.P v. City and County of San Francisco*, 27 Cal.4th 643, 672 n. 14 (2002) (referring to the fact that petitioners abandoned their takings claims based on economic impact "as they climbed the appellate ladder"). Thus, by the time this litigation returned to the federal courts for the second time, the only claims petitioners were actively pursuing, and as to which they were seeking to avoid preclusion, were based on the substantially advances theory.

Thus, the specific question raised by this case is whether the California courts' rejection of petitioners' claims based on the substantially advances theory should preclude petitioners from relitigating claims based on the same theory under the federal Constitution in federal court. However, in the pending case of *Lingle v. Chevron*, U.S. No. 04-163, the Court has granted review to resolve whether a substantially advances claim represents a legitimate claim under the Just Compensation Clause at all, or whether instead such a claim raises a claim under the Due Process Clause. A decision in *Lingle* repudiating the substantially advances theory of takings liability would make a ruling in this case of questionable value, at best.

As a general proposition, it is inherently hazardous for the Court to entertain a question about the collateral consequences of a judgment based on a particular theory of liability when the validity of the theory of liability is itself in serious doubt. At best, the Court runs the risk of wasting judicial time and effort. At worst, the Court runs the risk of creating needless doctrinal confusion and unpredictability.

This potential difficulty might safely be ignored if the Court could be confident that the preclusive effect of a

takings judgment does not vary depending upon the specific nature of the takings theory being advanced. However, just the opposite might be true. The Court has indicated, without actually resolving whether a substantially advances claim represents a viable takings theory, that claims based on this theory would be governed by a *different* set of "ripeness" rules than the ripeness rules that govern traditional regulatory takings claims based on the burdensomeness of legitimate government actions. *See Yee v. Escondido*, 503 U.S. 519 (1992). Because a substantially advances claim "does not depend on . . . the extent to which [plaintiffs] are compensated," *id.* at 534, the Court said in *Yee*, the *Williamson County* state-court compensation requirement would not apply to this type of claim. Given this premise, different preclusion rules might apply to substantially advances claims than to claims based on adverse economic impact; indeed, petitioners' primary argument for why a taking claimant should be permitted to relitigate a taking claim in federal court is that the claimant is generally required under *Williamson County* to litigate the claim in state court first. Accordingly, the Court cannot be confident that its ruling on the preclusion issue in this case would not turn in part on the fact that petitioners are advancing a substantially advances claim (which may not represent a valid takings claim at all).

2. A second, closely related point is that the premise of the question presented—that petitioners were "required" to litigate their takings claims in state court—is not correct given the facts of this case. Petitioners, purely as a result of their voluntary choice, elected to litigate their takings claims in state court. Therefore, this case does not present the question that the petition for *certiorari* says it presents: what should be the preclusive effect of a judgment in a state court takings suit that a litigant was "required" to prosecute in order to "ripen" a federal takings claim? For this reason as well, the Court should consider dismissing this case and defer

resolution of this question until the Court is presented with a case that actually raises the question.

The voluntariness of petitioners' decision to litigate their takings claims in state court is directly relevant to the question of whether this is an appropriate case in which to attempt to decide the question presented. A central element of petitioners' argument is that it is "unfair" to compel a takings claimant to pursue a takings claim in state court and then, once the litigation has been concluded, to rely on the results of that litigation to bar the claimant from litigating the same claim under federal law in federal court. In fact, as the Conference discusses below, there is nothing unfair about this established rule; the only possible basis for thinking this rule is unfair is the mistaken notion that every litigant with a federal constitutional claim is entitled to have the claim heard by a federal court rather than a state court, a premise this Court has forcefully rejected. The immediately relevant point, however, is that these petitioners voluntarily chose to litigate their takings claims in state court and, therefore, this case does not involve the type of putative unfairness upon which petitioners are basing their legal arguments. Because this case does not present the circumstances that petitioners contend support creating an exception to operation of the Full Faith and Credit Act, this is an inappropriate case in which to weigh arguments for and against the creation of such an exception.

As discussed, petitioners contend that San Francisco's Residential Hotel Unit Conversion and Demolition Ordinance and its North Beach Neighborhood Commercial District zoning ordinance effect a taking because they fail to "substantially advance" a legitimate state interest. Petitioners presented these claims in the court below as both a "facial" taking claim and as an "as applied" taking claim. To explain why, contrary to the premise of the petition for *certiorari*, petitioners were *not* "required" to pursue their takings claims

in state court, it is helpful to address the facial and as applied claims separately.

Facial Claim. In its initial 1998 ruling, the U.S. Court of Appeals for the Ninth Circuit held that petitioners' facial substantially advances claim was "ripe" for consideration in federal court. *See San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1101 (9th Cir. 1998). The unmistakable meaning of that ruling was that petitioners were under no obligation to litigate this takings claim in state court in order to "ripen" the federal claim. Based on the understanding that the availability of compensation is irrelevant to a substantially advances taking claim, the court ruled that this type of claim was "ripe" for consideration in federal court regardless of whether compensation had been sought through state procedures. *Id.* at 1102, citing *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 409-10 (9th Cir. 1996). Because the Ninth Circuit plainly concluded that petitioners' facial substantially advances claim already was "a live" claim, *see id.* at 1102, petitioners are mistaken in asserting that they were "required" to resort to state court prior to prosecuting this federal claim in federal court.

The Ninth Circuit also decided, at petitioners' request,[3] to "abstain" from resolving petitioners' facial substantially advances claim pursuant to *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). *See* 145 F.3d at 1104-05. However, contrary to petitioners' suggestion, this abstention order did

[3] Petitioners first raised the possibility of abstention in the court of appeals, even though they had elected to sue in federal court and were pursuing an appeal from an adverse ruling by the federal district court. The Ninth Circuit observed, "Unsurprisingly, the City views [petitioners'] request for abstention as an outrageous act of chutzpah, and argues that [petitioners] should be stuck with the federal forum [they] chose." 145 F.3d at 1104-05. Nonetheless, the court concluded that the abstention issue could properly be addressed at any time during the litigation, and that abstention was in fact warranted in this case.

not compel petitioners to assert their takings claims in state court. The Ninth Circuit abstained in order to allow the California courts to resolve, as a matter of local law, whether petitioners' hotel property had improperly been classified as "residential" and whether petitioners were therefore exempt from the need to obtain regulatory approval to operate their hotel for tourist purposes. *See id.* at 1005. Nothing in the abstention order required petitioners to submit to the state court, along with their local law claim, a constitutional takings claim, either under state or federal law. Petitioners' decision to submit their takings claim in state court was completely voluntary.

The understanding that petitioners' decision to litigate their substantially advances claim in state court was voluntary is entirely consistent with *Pullman*. *Pullman* established that federal courts can properly defer resolution of a federal constitutional claim in order to give a state court the opportunity to address a potentially-dispositive issue of state law that might obviate the need to address the constitutional issue. In *Pullman* itself, the Court ruled that the federal court should defer resolving whether an order of the Texas Railroad Commission produced discrimination in violation of the Fourteenth Amendment in order to provide the Texas courts an opportunity to resolve whether the Commission had the statutory authority to issue the challenged order. *Pullman* did not suggest that plaintiffs, in the course of litigating the issue of Texas statutory law, had an obligation to submit their constitutional claim for resolution in the state court as well. To the contrary, the clear message of the decision is that the plaintiffs were entitled to reserve their constitutional claim for resolution in federal court.

The Court's subsequent decision in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), confirmed that an abstention order does not require a litigant to submit its constitutional claim for resolution by the state

courts. *England* addressed the procedures that apply when a claimant has properly involved federal court jurisdiction, the federal court has abstained under *Pullman* to allow a state court to address a potentially dispositive issue of state law, and the plaintiff wishes to preserve the option of litigating its federal constitutional claim in federal court. The Court ruled that a litigant who has properly invoked federal court jurisdiction in the first instance is entitled to insist upon his choice of a federal forum to hear his federal claim. At the same time, the Court recognized that a litigant could choose to waive the opportunity to litigate the constitutional issue in federal court by submitting the constitutional claim in state court, and that a litigant should be forever bound by the results of that choice. *See id.* at 419 ("we see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court"). The Court instructed that, when a litigant wishes to reserve the right to return to federal court, and avoid an inadvertent submission of the constitutional claim to the state court, the litigant should make a formal "reservation" indicating an intention to litigate the constitutional issue in federal court.

In this case, the effect of the abstention order was to require petitioners, prior to pursuing their "ripe" substantially advances claim in federal court, to seek resolution of the underlying local law question about the proper classification of their hotel property. If petitioners wished to reserve their federal constitutional claim for resolution in federal court, they were free to do so, and they could have asked the federal court to proceed to resolve their federal constitutional claim as soon as the local law issue had been resolved (assuming the resolution of that issue did not moot the entire case).[4] At

[4] The effect of the Ninth Circuit abstention order was that petitioners' facial substantially advance claim was held in abeyance pending resolution of the statutory issue. *See San Remo*, 145 F.3d at 1095 (remanding the case "with instructions to enter a stay under *Pullman*").

the same time, in accordance with *Pullman* and *England*, petitioners also had the option of submitting their constitutional claim in state court. In actuality, petitioners sought, in effect, to "have their cake and eat it too," by submitting in the state court their substantially advances claim under state law, but attempting to "reserve" the *substantively identical* substantially advances claim under federal law.

As a result, the actual issue presented by this case is quite different from the question framed by the petition for *certiorari*. This case involves the question of whether, following an abstention order, and after the claimant has *voluntarily* submitted the constitutional claim under state law in state court, the claimant is precluded from attempting to relitigate the substantively identical claim under federal law in federal court. Thus, even though petitioners already litigated the substantially advances claim under the California Constitution in state court, and even though the federal and state Constitutions provide equivalent protections in this context, and even though petitioners could have reserved the constitutional issue altogether and litigated the substantially advances claim as a matter of federal law in federal court in the first instance, petitioners nevertheless claim they are now entitled to relitigate the substantially advances claim for a second time in federal court.

The Federal District Court in California and the Ninth Circuit rejected this position, and properly so based on the Court's prior precedent. In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), for example, the Court ruled that a litigant's decision to present an employment discrimination claim under state law in state court precluded the plaintiff from subsequently attempting to relitigate the same issue under federal law in federal court. The Court observed

that, as in this case, nothing obligated the plaintiff to file its state law claim in state court, but having elected to do so, he was barred from raising the substantively identical claim under federal law in federal court. Denying preclusive effect to the state court judgment in this circumstance, the Court said, "would violate basic tenets of comity and federalism." *Id.* at 478.

The directly relevant point for present purposes, however, is that the case simply does not present the question framed by the petition for *certiorari*. Because petitioners faced no bar to prosecuting their facial substantially advances claim under federal law in federal court, and they voluntarily decided to submit their state-law substantially advances claim in state court, this case does not involve a situation where a takings claimant was "required" to submit a state law claim in federal court in order to "ripen" the federal claim. In this case, the federal claim was ripe in federal court before the petitioners even filed their state lawsuit. This case is not the case described in the petition for *certiorari*.

As Applied Claim. While the procedural history of the second part of petitioners' case is somewhat more complicated, petitioners were not "required," based on a proper understanding of applicable law, to submit an "as applied" substantially advances claim in state court either. Thus, it appears that the entirety of petitioners' case falls outside the scope of the question framed by the petition for *certiorari*.

The ambiguity surrounding the as applied substantially advances claim arises from the fact that the Ninth Circuit ruled in 1998 that petitioners' as applied claim was subject to *Williamson County's* state-compensation requirement, and in this sense "required" petitioners to pursue that "claim" in state court. *See* 145 F.3d at 1102. However, it is not clear what the Court understood that claim to encompass, and specifically whether it included a substantially advances theory, as opposed to petitioners' (initially asserted, but subsequently abandoned, see note 2, *supra*) takings claim based on the regulations' allegedly adverse economic impact. The Ninth Circuit opinion is simply opaque on what theory or theories of takings liability it believed were included in the as applied claim. The uncertainty is compounded by the fact that the Federal District Court, on October 15, 2002, following the decision of the California Supreme Court, ruled that petitioners' complaint, which closely tracked petitioners' initial federal complaint, failed to present a viable as applied substantially advances claim. While petitioners subsequently filed an amended complaint in order to state an as applied claim, this ruling suggests that the district court might well have regarded petitioners' initial complaint, filed prior to the litigation in the California courts, as not including an as applied substantially advances claim either. In sum, it is simply unclear whether the Ninth Circuit's ruling that the as applied claim was subject to *Williamson County* was intended to address a claim based on the substantially advances theory.

In any event, and regardless of what the Ninth Circuit actually intended in 1998,[5] there is no reason to believe that an as applied substantially advances claim is any more subject to *Williamson County's* state-compensation requirement than a facial substantially advances taking claim. *See Brief Amici Curiae of Equity Lifestyle Properties, Inc., et al., in support of petitioners* (advancing the same position). A

[5] In the 1998 *San Remo* decision the court cited an earlier Ninth Circuit decision which stated, in *dictum*, that both prongs of *Williamson County* "are clearly applicable" to "all" as applied cases, but that the applicability of the state-compensation requirement to a facial claim depends on whether the claim alleges a denial of all economically viable use or is based on the substantially advance theory. *See Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 405 (9th Cir. 1996). As discussed in text, this distinction is untenable, given the basic character of the substantially advances takings theory and its focus on actions that should not be permitted to proceed at all, rather than on actions that can properly proceed on the condition that the government pay just compensation.

substantially advances claim, whether facial or as applied, focuses on the legitimacy of the government action. Such a claim, by its nature, cannot be cured by payment of just compensation. Therefore such a claim cannot logically be subject to the *Williamson County* state-compensation requirement, regardless of whether it is framed as a facial claim or as an as applied claim.[6]

The idea that an as applied substantially advances claim might be subject to the state compensation requirement of *Williamson County* is inconsistent with this Court' s decision in *Yee v Escondido*, 503 U.S. 519, 534 (1992), in which the Court indicated that a substantially advances claim "does not depend on . . . the extent to which [plaintiffs] are compensated." The Court's conclusion that such a claim would be ripe without the need to exhaust state compensation procedures rests on the substantive nature of the takings theory, not on whether the theory is being asserted in a facial claim or as an as applied claim. Thus, the Ninth Circuit should have recognized that an as applied substantially advances claim, like a facial substantially advances claim, is not subject to the state compensation requirement of *Williamson County*. Applying this conclusion in this case, petitioners were not "required" to litigate either version of their substantially advances claim in state court.

Because the better view is that the Ninth Circuit could not properly have "required" petitioners to litigate *any* of their substantially advances claims in state court, this case would be a singularly poor vehicle for addressing what preclusion rules should apply to takings claims when litigants *are* required to litigate the claims in state court. While, as we

[6] By contrast, *Williamson County* does logically apply to claims under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which involve alleged expropriations of private property in the form of unconstitutional conditions attached to land use permitting decisions.

discuss below, involuntary participation in state court proceedings hardly creates a blanket exception to the Full Faith and Credit Act, the petitioners' arguments in this case rest in large part on the alleged unfairness of giving preclusive effect to judgments in state court proceedings in which they were involuntary participants. Since the factual premise of "involuntariness" underlying these arguments is not met in this case, this is an inappropriate case to test the merits of petitioners' arguments.

* * *

It is also noteworthy that the conclusion that petitioners' substantially advances claims were immediately "ripe" for consideration in federal court also makes irrelevant, at least in the context of this particular case, petitioners' argument that takings claimants must be granted the opportunity to relitigate their takings claims in federal court in order to ensure that *some* forum is available to hear their federal constitutional claims. As the Conference discusses below, it is far from clear that a takings claimant can assert an absolute right to litigate a takings claim under federal law when he has the opportunity to litigate the substantively identical claim under state law. In any event, this case simply does not provide an appropriate occasion to address petitioners' argument. For the same reason that the Ninth Circuit correctly ruled that petitioners' substantially advances claim was immediately ripe in federal court, petitioners' substantially advances claim also was immediately ripe in state court. Under the reasoning of the Ninth Circuit, if petitioners had wished to do so, they were entitled to prosecute this federal takings claim alongside their state takings claim in the state court. Thus, contrary to petitioners' suggestion, this case does not present the question of whether takings litigants should be permitted to relitigate takings claims in federal court in order to preserve the opportunity to present a federal taking claim in some court. For this additional reason, this is not an appropriate case in which to address the issue framed by the petition for

certiorari. The Court should consider dismissing this case on the ground that the writ of *certiorari* was improvidently granted.

II. ALLOWING DUPLICATIVE LITIGATION OF TAKINGS CLAIMS IN STATE AND FEDERAL COURT WOULD PRODUCE A SERIOUS WASTE OF JUDICIAL RESOURCES, UNDERMINE JUDICIAL COMITY, AND BE INCONSISTENT WITH THE POLICY FAVORING REPOSE.

Petitioners propose that they and other takings claimants should routinely be permitted to litigate substantively identical takings claims twice, first in state court (under state law), and then a second time in federal court (under federal law). Apart from the fact that there is no legal warrant for this position, as we discuss in the following section, this proposal raises serious risks of harm to the federal and state judiciaries and to the relationship between these coordinate judicial institutions within our federal system of government.

Permitting duplicative litigation of a single substantive takings claim would produce a very substantial waste of judicial resources for no good purpose. Both the federal courts and state courts continue to confront rapidly increasing case loads. *See Chief Justice's 2004 Year-End Report on the Federal Judiciary*, January 1, 2005, at 9-11; National Center for State Courts, *Examining the Work of the State Courts, 2003*, at 10. At the same time, both court systems face increasing budget constraints; indeed, in his latest year-end report, Chief Justice Rehnquist highlighted the "funding crisis currently affecting the Federal Judiciary." In view of the important work of the federal and state courts, and the challenges both systems already face in meeting their responsibilities to the public, requiring federal and state

courts to adjudicate a single takings lawsuit *twice* would represent a serious misallocation of scare resources.

Furthermore, allowing takings litigants to litigate takings claims successively in state and federal court would undermine the principle of comity that governs the relationship between the federal and state court systems. As the Court has explained, the "federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design." *Kowalski v. Tesmer*, 125 S.Ct. 564, 569 (2004), *quoting Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999). This cooperative design would obviously be undermined if state court judgments on taking claims could routinely be subjected to correction and revision in federal court.

For the same reason, allowing this type of duplicative litigation would be inconsistent with the *Rooker-Feldman* doctrine. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Under the *Rooker-Feldman* doctrine, a party who has lost a suit in state court is generally barred from seeking what in substance would be appellate review of the state judgment in federal court. Yet, where a takings claimant seeks to relitigate in federal court a taking claim that is substantively identical to a claim that he has already litigated in state court, such a suit, in effect, asks the federal court to exercise appellate jurisdiction over the state courts.

Finally, petitioners' position is inconsistent with the Court's longstanding recognition of the high value of bringing repose to legal disputes. As the Court explained in *Federated Department Stores, Inc. v. Moietie*, 452 U.S. 394, 401 (1981):

> This Court has long recognized that '[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of

> the contest, and that matters once tried shall be considered forever settled as between the parties.' We have stressed that '[t]he doctrine . . . is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and private peace,' which should be cordially regarded and enforced by the courts.

Id. at 401. Allowing takings claimants, once they have unsuccessfully prosecuted a takings claim under state law in state court, to pursue a substantively identical claim under federal law in federal court would plainly violate the policy favoring repose. As the Court has recognized, in the context of overlap of jurisdiction between state and federal courts, the policy of repose not only serves the traditional functions of claim and issue preclusion, *see Kremer*, 456 U.S. at 467, n.6, *quoting Allen v McCurry*, 449 U.S. 90, 94 (1980) (preclusion doctrine "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication"), but also serves to "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Id.*

III. PETITIONERS ARE BARRED BY THE FULL FAITH AND CREDIT ACT FROM SEEKING TO RELITIGATE TAKINGS CLAIMS IN FEDERAL COURT.

Assuming for the sake of argument that petitioners had been required under *Williamson County* to litigate a proper takings claim for compensation in state court in the first instance, they should nevertheless still be barred from relitigating the same claim in federal court. [1]

1. The Full Faith and Credit Act, 28 U.S.C. §1738, provides that the records and proceedings in any state court

"shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State. . . . from which they are taken." The statute has been interpreted to require federal courts to give "a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School District Bd. of Educ.*, 465 U.S. 75, 81 (1984). Thus, if a state court would treat litigation of an issue as precluded by a prior ruling, the federal courts must apply the same rule. In this case, the Ninth Circuit ruled that because the California courts would conclude that petitioners are barred from relitigating their takings claims, petitioners were barred from seeking to relitigate the claims in federal court.

As the Court explained in *Migra*, the Full Faith and Credit Act reflects Congress' considered policy judgment "that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims." *Id.* at 84. Thus, the Court has recognized that the command of the Full Faith and Credit Act applies regardless of whether a litigant has chosen the state forum voluntarily. What matters is that the litigant has a full and fair opportunity to litigate the issue in some court, including the opportunity to obtain correction on issues of federal law in this Court. In *Allen v. McCurry*, 449 U.S. 90 (1980), the Court ruled that a section 1983 claimant in federal court was barred from asserting a claim based on an allegedly unconstitutional search and seizure when the constitutionality of the search and seizure had already been resolved in a state criminal proceeding that led to plaintiff's conviction. The Court concluded that the fact that plaintiff's participation in the state proceeding was involuntary was irrelevant. "There is," the Court said, "no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state

court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all." *Id.* at 104.

The Court also has recognized that Congress can, in its discretion, enact legislation amending the Full Faith and Credit Act to permit successive litigations in state and federal courts that the statute would otherwise prohibit. *See Allen v. McCurry*, 449 U.S. at 99. However, the Court has said that "an exception to §1738 will not be recognized unless a later statute contains an express or implied partial repeal." *Kremer*, 456 U.S. at 468. Petitioners point to no federal legislation that repeals the Full Faith and Credit Act and permits federal courts to ignore principles of claim and issue preclusion in the context of takings litigation. To the contrary, during the last decade, several bills have been introduced in Congress that would have modified the state-compensation requirement of *Williamson County* as well as other aspects of the Court's ripeness rules for takings cases. *See generally* S.Rep. 105-242 (Private Property Rights Implementation Act of 1998). However, these bills repeatedly failed to gain passage. Especially in light of the fact that Congress has declined to alter the current allocation of federal and state court jurisdiction in takings cases, the Court should reject petitioners' invitation to create an exception to the Full Faith and Credit Act in this case.

2. Contrary to petitioners' assumption that they have an entitlement to a federal forum, there is no absolute right to litigate federal constitutional issues in a federal court. It is well established that the Constitution "left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe." *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). Even after the establishment of the federal courts, Congress

has not vested the federal courts with the full scope of the jurisdiction that they could be granted under the Constitution. *See* Kathryn E. Kovacs, "Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under Williamson County," 21 *Ecology Law Quarterly* 1, 36 (1999). Thus, there is no historical foundation for the idea that every takings claimant is entitled to present a federal claim in federal court.

Moreover, the Court has repeatedly recognized that the state courts have both the responsibility and authority to protect federal constitutional rights when called upon to do so. "State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law." *Stone v. Powell*, 428 U.S. 465, 494 n. 35 (1976), *citing Martin v. Hunter's Lessee*, 1 Wheat. 304, 341-344 (1816). As the Court explained in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), respect for the state courts' coordinate responsibility in enforcing federal constitutional rights reinforces basic principles of federalism:

> Interpretation of federal law is the proprietary concern of state, as well as federal, courts. It is the right and duty of the States, within their own judiciaries, to interpret and to follow the Constitution and all laws enacted pursuant to it, subject to a litigant's right of review in this Court in a proper case. The Constitution and laws of the United States are not a body of law external to the States, acknowledged and enforced simply as a matter of comity. The Constitution is the basic law of the Nation, a law to which a State's ties are no less intimate than those of the National Government itself. The separate States and the Government of the United States are bound in the common cause of preserving the whole constitutional order. Federal and state law 'together form one system of jurisprudence.'

Id. at 275-76, *quoting Claflin v. Houseman*, 93 U.S. 130, 137 (1876).

3. Petitioners and their *amici* erroneously contend that one consequence of a rule barring takings claimants from relitigating their takings claims in federal court is that they may be unfairly barred from litigating their federal takings claims in *any* court. This argument is based on the understanding that the ripeness doctrine of *Williamson County*, combined with claim and issue preclusion doctrines, might mean that traditional takings claims based on adverse economic impact would not only be barred in the first instance in federal court, but they would also be barred in state court as well. According to this view, federal takings claims must be deemed "premature," in state court, just as they would be in federal court, if relief is potentially available under state law. Assuming a claim is initially filed under state law in state court, once the state law claim is rejected, the federal claim would be immediately precluded. In this fashion, according to this argument, not only is a takings claimant barred from pursuing a federal takings claim in federal court when state compensation procedures are available, but the claimant is barred from pursuing the federal claim in state court as well.

In the first place, if federal and state law are substantively identical, then the litigant suffers no actual deprivation as a result of having to litigate the claim as a matter of state law. Furthermore, insofar as federal and state law are regarded as substantively identical, and the state law claim is interpreted and applied in light of federal law precedents, full review should be available in this Court. *See Pennsylvania v. Muniz*, 496 U.S. 582, 588 n.4 (1990). Finally, to the extent there is not a complete and perfect overlap between state and federal law, a prior state court resolution of a state law claim should *not* preclude litigation of the distinctive federal law issue in federal court, as the lower federal courts have recognized on numerous occasions. *See, e g., Dodd v. Hood River County*, 136 F.2d 1219 (9th Cir. 1998).

More fundamentally, however, petitioners' argument that *Williamson County* bars prosecution of a federal takings claim alongside a state law claim in state court appears to be incorrect. Certainly this position is inconsistent with numerous decisions of this Court involving review of state courts' interpretation of the federal Just Compensation Clause. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). These cases necessarily rest on the premise that the state courts have full authority and competence to hear takings claims under the U.S. Constitution. The Fifth Amendment applies directly to the states via the Fourteenth Amendment, and state compliance with the Federal Constitution includes, of course, a responsibility on the part of state judicial institutions to address legal claims brought under the federal Constitution.

Furthermore, petitioners' argument would apparently make nonsense of the Court's landmark decision in *First English Evangelical Lutheran Church v. City of Los Angeles*, 482 U.S. 304 (1987). In that case, the Court ruled that the California Supreme Court erred in not recognizing that the Just Compensation Clause provides a direct right to financial relief against government defendants. The decision would have been a pointless exercise if state courts generally, and the California courts in particular, were powerless to address federal takings claims on the merits. It is obvious that the Court believed the California Supreme Court and other state courts would, in fact, have a direct obligation to implement *First English*'s interpretation of the mandate imposed by the Just Compensation Clause. When the Court said, "A landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation," it clearly contemplated that such a suit could be brought in state court. 482 U.S. at 315. *See also id.* ("Claims for just compensation are grounded in the Constitution itself.").

The argument that *Williamson County* precludes state courts from directly addressing takings claims under the Fifth Amendment, whether filed alone or in tandem with takings claims under state law, is based on an unnecessarily broad reading of that decision. *Williamson County* involved a federal takings claim filed in federal court. The Court ruled that a claim for compensation in federal court under the Just Compensation Clause is "premature" when state procedures for obtaining compensation are available. The Court's explanation for this ruling was that the Just Compensation Clause only prohibits uncompensated takings, and a federal court cannot determine whether a State or one of its subdivisions has both effected a taking, and refused to provide the necessary compensation, unless and until the State has had an opportunity to pass on a claim for compensation. This reasoning does not support the conclusion that a federal claim is necessarily premature when a state court, rather than a federal court, receives a claim for compensation based on an alleged taking. A state court, in addressing a claim for compensation under the Just Compensation Clause (or the state equivalent), is being asked to determine, on behalf of the State, whether the State will provide the compensation mandated by the Constitution. The Court in *Williamson County* referred to the need for takings claimants to pursue "state procedures," but the case does not hold that the substantive basis for the claim for compensation in the state forum must be limited to state law and that the state lawsuit cannot include a claim under the federal Constitution.

4. Petitioners also contend that, because they made a so-called "*England* reservation" in the California trial court, reserving the "right" to prosecute their federal takings claims in federal court, they should be permitted to relitigate their substantially advances claims in federal court. *See England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411

(1964). This argument is mistaken and should be rejected as well.

First, an *England* reservation cannot properly be deployed to authorize successive litigation of claims for compensation in state court, under state law, and then later in federal court, under the Just Compensation Clause. In general, claim preclusion applies to claims that were asserted, or that could have been asserted, in the first proceeding. For the reasons discussed, a claim under the Just Compensation Clause can be joined with a taking claim under state law in state court and, therefore, a state court judgment in a takings case ordinarily should bar the plaintiff from asserting a federal taking claim in any subsequent federal court case, whether or not the plaintiff actually raised the federal takings claim in state court.

An *England* reservation should not operate as an end-run around claim preclusion in this context. Under *Williamson County*, a claimant cannot bring a traditional takings suit based on adverse economic impact in federal court in the first instance when there is an available state process for obtaining compensation. However, *England* only applies in the situation where a plaintiff can "properly invoke" federal court jurisdiction to hear a federal constitutional claim in the first instance. *Id.* at 415. *See also id.* ("The right of a party plaintiff to choose a Federal court *where there is a choice* cannot be properly denied."), *quoting Wilcox v. Consolidated Gas Co.*, 212 U.S. 19 (1909) (emphasis added). It would "expand[] the *England*-reservation doctrine beyond its intended scope" to permit a plaintiff to "reserve" the opportunity to litigate a federal takings claim in federal court that, by its nature, could not be filed directly in federal court in the first place. *DLX, Inc. v. Kentucky*, 381 F.3d 511, 531-32 (6th Cir. 2004) (Baldock, J., concurring in the judgment). *See also Allen v. McCurry*, 449 U.S. 90, 101 n. 17 (1980) ("The holding in *England* depended entirely on this Court's view of the purpose of abstention in such a case: Where a

plaintiff properly invokes federal-court jurisdiction in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction.").

Furthermore, it would distort the function of an *England* reservation to treat it as a device authorizing a claimant to assert substantively identical legal claims in state court and then again in federal court. In *England* the federal court abstained to permit state-court resolution of a state statutory issue that was substantively unrelated to the federal constitutional claim. *See also Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) (same). It would place an entirely new twist on *England* to interpret it, not as authorizing "reservation" of a distinctive federal claim for resolution in federal court, but as authorizing duplicative litigation of what is, in substance, the exact same claim in state as well as federal court. Indeed, a central premise of *England* is that a litigant can properly be compelled to litigate a constitutional claim in *either* state *or* federal Court; the Court specifically observed that duplicative litigation of the same issue in federal and state court would disrupt "the harmonious relation between state and federal authority." 375 U.S. at 421 n. 12. By contrast, the ersatz version of the *England* reservation proposed by petitioners would turn it into a device for obtaining multiple forums to hear the same constitutional claim. Neither the holding nor the reasoning of *England* suggests that a plaintiff should have the opportunity to litigate what is in substance the exact same claim twice.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Ninth Circuit.[7]

Respectfully submitted,

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March 1, 2005

[7] Several of petitioners' *amici* have suggested that the Court overrule *Williamson County* and its holding that takings claimants suing for compensation under the Just Compensation clause based on state and local government action must pursue available state compensation procedures instead of suing in federal court. Even if the Court does not dismiss the writ as improvidently granted, it should decline to address this issue, because it is plainly outside the scope of the question presented.

(12)

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IN THE

Supreme Court of the United States

SAN REMO HOTEL, L.P., ET AL.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* DEFENDERS OF PROPERTY RIGHTS AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES....ii

INTERESTS OF *AMICI CURIAE*....1

SUMMARY OF ARGUMENT....2

ARGUMENT....5

I. A TAKINGS CLAIM UNDER THE FIFTH AMENDMENT IS RIPE WHEN A STATE OR LOCAL ADMINISTRATIVE AGENCY ISSUES A FINAL DECISION THAT HAS THE EFFECT OF RESTRICTING THE USE OF PRIVATE PROPERTY WITHOUT COMPENSATION....5

II. THIS COURT SHOULD EITHER CLARIFY OR RECONSIDER *WILLIAMSON COUNTY*'S RIPENESS REQUIREMENT....6

CONCLUSION....18

TABLE OF AUTHORITIES

Page

CASES

21st Century Telesis Joint Venture v. FCC, 318 F.3d 192 (D.C. Cir. 2003).....6

Adams Outdoor Advertising v. City of East Lansing, 2001 U.S. Dist. LEXIS 5549 (W.D. Mich. 2001).....15

Agins v. City of Tiburon, 447 U.S. 255 (1980).....6

Agripost, Inc. v. Miami-Dade County, 195 F.3d 1225 (11th Cir. 1999).....17

Agostini v. Felton, 521 U.S. 203 (1997).....8

Anderson v. Charter Township of Ypsilanti, 266 F.3d 487 (6th Cir. 2001).....17

Bessette v. Avco Fin. Servs., 230 F.3d 439 (1st Cir. 2000).....2

Burton v. United States, 196 U.S. 283 (1905).....8

City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997).....8

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).....2

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).....14

DLX, Inc. v. Commonwealth of Kentucky, 381 F.3d 511 (6th Cir. 2004).....5, 17

Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995).....14

Dodd v. Hood River County, 136 F.3d 1219 (9th Cir. 1998).....13, 14

Dolan v. City of Tigard, 512 U.S. 374 (1994).....1, 16

EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).....2

Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332 , (1st Cir. 2000).....2

Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 364 F.3d 102 (3d Cir. 2004).....15

Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299 (11th Cir. 1992).....13, 14

Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275 (4th Cir. 1998).....13, 14

Gash Assoc. v. Village of Rosemount, 995 F.2d 726 (7th Cir. 1993).....15

Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).....2

Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197 (1991).....8

Jacobs v. United States, 290 U.S. 13 (1933).....16

Jennings v. Caddo Parish School Bd., 531 F.2d 1331 (5th Cir. 1976).....14

Keene Corp. v. United States, 508 U.S. 200 (1993).....1

Kirby Forest Indus., Inc. v. United States, 467 U.S. 1 (1984).....12

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).....1

Lujan v. National Wildlife Found., 497 U.S. 871 (1990).....6

Monterey v. Del Monte Dunes at Monterey, Ltd., U.S. 687 (1999).....1

Neal v. United States, 516 U.S. 284 (1996).....8

Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726 (1998).....17

Palazzolo v. Rhode Island, 533 U.S. 606 (2001).....1, 2, 5

Palomar Mobilehome Park Ass'n v. City of San Marcos, 989 F.2d 362 (9th Cir. 1993).....13

Parratt v. Taylor, 451 U.S. 527 (1981).....11-12

Peduto v. City of North Wildwood, 878 F.2d 725 (3d Cir. 1989).....13, 14

Printz v. United States, 521 U.S. 898 (1997).....8

Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment, 178 F.3d 1295 (6th Cir. 1999).....13

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).....14

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).....9-11

San Remo Hotel, L.P. v. San Francisco City and County, 364 F.3d 1088 (9th Cir. 2004).....14

Santini v. Connecticut Hazardous Waste Mgmt. Serv., 342 F.3d 118 (2d Cir. 2004).....5, 14, 17

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997).....1

Teague v. Lane, 489 U.S. 288 (1989).....8

Vasquez v. Hillery, 474 U.S. 254 (1986).....8

United States v. Miller, 317 U.S. 369 (1943).....11

Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson, 473 U.S. 172 (1985).....2, 7-12, 16

Wilkinson v. Pitkin County Bd. of Comm'rs, 142 F.3d 1319 (10th Cir. 1998).....13, 15

Constitutions

U.S. Const. amend. V.....3, 5

Statutes

28 U.S.C. § 1491.....9

Other Authorities

Stephen E. Abraham, *Williamson County Fifteen Years Later: When is a Takings Claim (Ever) Ripe?*, 36 Real Prop. Prob. & Tr. J. 101 (2001).....3

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Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 2 Wash. U. J.L. & Pol'y 99 (2000).....3-4, 16

John J. Delaney and Duane Desiderio, *Who Will Clean Up The "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195 (1999).....13

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Douglas W. Kmiec, *Disentangling Substantive Due Process and Taking Claims*, 13 Zoning & Planning Law Report 57 (1990).....4

18 James Wm. Moore et al., Moore's Federal Practice 131.12[1] (Matthew Bender 2003).....12

Gregory M. Stein, *Regulatory Takings and Ripeness in Federal* Courts, 48 Vand. L. Rev. 1 (1995).....16

BRIEF OF *AMICI CURIAE* DEFENDERS OF PROPERTY RIGHTS AND NEW ENGLAND LEGAL FOUNDATION

Pursuant to Rule 47.3, *amici curiae* Defenders of Property Rights and New England Legal Foundation respectfully submit this brief in support of petitioners and ask that the judgment below be reversed.[1]

INTERESTS OF *AMICI CURIAE*

Defenders of Property Rights ("Defenders") is the only national public interest legal foundation devoted exclusively to protecting private property rights. Defenders participates in litigation across the country involving property rights and the Takings Clause of the Constitution. Since its founding in 1991, Defenders has participated in many significant property rights cases before the United States Supreme Court, including *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

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[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of Court. No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

New England Legal Foundation ("NELF") is a non-profit, public interest law firm, incorporated in 1977 and headquartered in Boston, Massachusetts. Its membership consists of corporations, law firms, individuals and others who support policies aimed at fueling economic growth, protecting the free enterprise system and defending economic rights. NELF regularly appears in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities, including *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332 (1st Cir. 2000); *Bessette v. Avco Fin. Servs.*, 230 F.3d 439 (1st Cir. 2000), *cert. denied*, 532 U.S. 1048 (2001).

Defenders and NELF have a vital interest in protecting the rights of property owners from undue interference by federal, state and local regulation and thus in this Court's decisions involving the Fifth Amendment's Takings Clause — the primary constitutional bulwark against such in-terference.

SUMMARY OF ARGUMENT

This case provides an opportunity for the Court to address the court of appeals' treatment of *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson*, 473 U.S. 172 (1985), as requiring that a property owner claiming that state or local regulation effects an unconstitutional taking under the Fifth Amendment must "seek compensation through the procedures the State has provided for doing so" — including full state court adjudication — before a claim will be considered ripe in federal court. For the reasons explained below, the more

appropriate view of the Fifth Amendment is that, when a state or local administrative action restricting the use of private property becomes final, and the regulatory authority does not make restitution for resulting economic loss, the property owner has a ripe claim in federal court that the state or local government has "taken [property] for public use, without just compensation." U.S. Const. amend. V. Prior, duplicative state-court litigation is not necessary to ripen such a claim.

In our view, as we explain below, the Court's precedent leading up to *Williamson County* does not support the court of appeals' reading of the decision. Moreover, even if the Court did intend *Williamson County* to impose the "state litigation requirement," that ruling is not *compelled* by the text of the Fifth Amendment and this Court may adopt a different interpretation if there are sufficiently strong reasons to depart from the doctrine of *stare decisis*.

Those reasons are present here. The state litigation requirement has run headlong into preclusion and abstention doctrines that deprive property owners in many cases of *any* opportunity to litigate their regulatory takings claims in federal court.[2] Indeed, *Williamson County* creates a "Catch

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[2] Commentators have long noted that *Williamson County*'s ripeness requirements create significant, unintended barriers to property owners pursuing federal takings claims in federal court. *See, e.g.*, Stephen E. Abraham, *Williamson County Fifteen Years Later: When is a Takings Claim (Ever) Ripe?*, 36 Real Prop. Prob. & Tr. J. 101, 104 (2001) ("*Williamson County* is regarded as posing formidable hurdles because of its two-part ripeness requirement, finality and compensation, that ultimately may block takings claims."); Maz Kidalov & Richard Seamon, *The Missing Pieces of the Debate Over Federal Property Rights Litigation*, 27 Hastings Const. L.Q. 1, 5 (1999) ("The U.S. Supreme Court has developed rules that make it almost impossible for federal courts to remedy violations of the Just Compensation Clause.").

22" for would-be federal takings plaintiffs: the federal court has no jurisdiction until the state court suit is completed (*Williamson County*), but completion of the state court suit precludes relitigation in federal court pursuant to the principles of res judicata, collateral estoppel and/or the *Rooker-Feldman* doctrine. In practical effect, then, there is no federal court remedy for regulatory takings. *See generally* Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers, in* Institute on Planning, Zoning, and Eminent Domain § 7 (Matthew Bender 1991); Douglas W. Kmiec, *Disentangling Substantive Due Process and Taking Claims*, 13 Zoning & Planning Law Report 57 (1990).

For example, in the present case, a California state court held that petitioners had no claim against the City of San Francisco. The Ninth Circuit then held that the state court's decision barred petitioners from litigating their Takings Clause claim in federal court. Thus, *Williamson County*'s ripeness requirement had the effect of granting the state court the only word on whether the city's regulation constituted a taking — although the state court stated unequivocally that it did *not* address the question as a matter of federal constitutional law.

That inappropriate consequence cannot be what this Court intended in *Williamson County*. Recognizing this, courts of appeals in several circuits have jumped through

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The state litigation requirement, when combined with the doctrines of preclusion, has proven entirely unworkable. *See, e.g.*, Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 2 Wash. U. J.L. & Pol'y 99, 102 (2000) ("When property owners follow *Williamson County* and first sue in state court, they are met in some federal circuits with the argument that state court litigation, far from ripening the federal cause of action, instead has extinguished it.").

linguistic or procedural hoops to avoid the harsh effects of the preclusion and abstention doctrines when combined with the state litigation requirement. *See, e.g., Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 130, 130 n.7 (2d Cir. 2004); *DLX, Inc. v. Commonwealth of Kentucky*, 381 F.3d 511, 518 n.3 (6th Cir. 2004). But those measures have resulted in a lack of uniformity in the lower courts and, even in circuits in which one can avoid preclusion or abstention by following certain procedures, traps for the unwary.

The appropriate answer to the chaotic and unfair state of the law is for this Court, as only it can do, to set aside the state litigation requirement. The Court should hold that a property owner may challenge in federal court a state or local regulation as an unconstitutional taking under the Fifth Amendment as long as the application of the regulation by the authority administering it is "final" within the meaning of *Williamson County*.

ARGUMENT

I. A TAKINGS CLAIM UNDER THE FIFTH AMENDMENT IS RIPE WHEN A STATE OR LOCAL ADMINISTRATIVE AGENCY ISSUES A FINAL DECISION THAT HAS THE EFFECT OF RESTRICTING THE USE OF PRIVATE PROPERTY WITHOUT COMPENSATION.

The Takings Clause of the Fifth Amendment provides: "Nor shall property be taken for public use, without just compensation." U.S. Const. amend. V. Property is "taken for public use" in a variety of ways stopping short of actual condemnation by the government. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001) (stating that a taking may occur when "a regulation interferes with reasonable investment-backed expectations") (citing *Penn Central Transp. Co. v. City of New York*, 438

U.S. 104, 124 (1978)); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (stating that application of a general regulation constitutes a taking when either it does not substantially advance a legitimate state interest or it denies the owner economically viable use of her land). Because government regulations rarely provide compensation to affected property owners, the dispositive legal issue in "regulatory takings" claims under the Fifth Amendment is ordinarily whether the regulation constitutes a "taking" as defined by this Court's precedent.

When a regulation (or, more often, a decision applying a regulation in a particular case) becomes final, the issue of whether it constitutes a taking is ripe for adjudication. *See Lujan v. National Wildlife Found.*, 497 U.S. 871, 891 (1990) ("[A] regulation is . . . considered . . . 'ripe' for judicial review . . . [once] the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him."); *cf. 21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 198 (D.C. Cir. 2003) ("[A] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all") (internal quotation marks and brackets omitted). If a regulatory action becomes final and the property owner receives no compensation, then the constitutional question is squarely presented. Requiring a property owner to challenge that action in state court does not make the constitutional claim more ripe — at best, it delays the resolution of the federal claim, and, at worst, it bars a federal court from addressing the constitutional issue at all.

II. THIS COURT SHOULD EITHER CLARIFY OR RECONSIDER *WILLIAMSON COUNTY*'S RIPENESS REQUIREMENT.

According to the court of appeals, in *Williamson County*, the Court placed two ripeness hurdles in front of takings claims brought in federal court against state and local governments or their political subdivisions. The first requirement — that a plaintiff receive a final administrative decision from the agency whose action is being challenged before filing in federal court — was satisfied in this case. 473 U.S. at 185. The purported second requirement — that plaintiffs "seek compensation through the procedures the State has provided for doing so" before turning to the federal courts, *id.* at 194 — is at issue.

Several lower courts have read *Williamson County* to mean that a property owner may not litigate any regulatory takings claim in federal court before exhausting state remedial options — including bringing a state court lawsuit. It is not clear, however, that *Williamson County* mandates that step. In that case, respondent had not obtained a final *administrative* decision regarding the application of the challenged zoning ordinance and subdivision regulations to its property. Thus, the federal court could not rule "until the administrative agency [had] arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 191.[3] Although the Court made a passing reference to the state's inverse-condemnation procedures, *id.* at 197, because the Court did

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[3] "As in *Hodel*, *Agins*, and *Penn Central*, then, respondent has not yet obtained a final decision regarding how it will be allowed to develop its property. Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause." *Williamson County*, 473 U.S. at 190.

not base its holding on any failure to satisfy a state litigation requirement, any language in the Court's decision that might be read as imposing such a requirement should properly be viewed as dictum. *See e.g.*, *Printz v. United States*, 521 U.S. 898, 963 (1997) (stating that the Court was not bound by language in a prior case that "was wholly unnecessary to the decision of the case"); *cf. Burton v. United States*, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.").[4]

Even if *Williamson County* did impose a state litigation requirement, there are good reasons for this Court to reconsider it.[5]

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[4] The Court's more recent decision in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), moreover, supports the view that *Williamson County* did not impose a state litigation requirement. In *International College*, the Court concluded that the district court properly granted the City's motion to remove, *inter alia*, plaintiff's federal takings claim despite the state court's having not determined the issue of just compensation. 522 U.S. at 529-31.

[5] *Stare decisis* "is at its weakest" when a prior decision involved the interpretation of the United States Constitution. *Agostini v. Felton*, 521 U.S. 203, 217 (1997) (*stare decisis* policy "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions"); *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.") (internal quotation marks omitted); *see also Neal v. United States*, 516 U.S. 284, 295 (1996). This Court has recognized an exception to *stare decisis* for precedents that have proved "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration." *Vasquez v. Hillery*, 474 U.S. 254, 266, (1986); *see also Teague v. Lane*, 489 U.S. 288, 333 (1989) (Brennan, J., dissenting) (quoting *Vasquez*). The state litigation requirement that the

First, *Williamson County*'s doctrinal underpinnings do not support a state litigation requirement. The Court in *Williamson County* drew an analogy to claims brought against the *federal* government under the Tucker Act. 473 U.S. at 194-95 (discussing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 998-99 (1984)). In *Monsanto*, a chemical company alleged that the government's disclosure of trade secrets submitted confidentially in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") amounted to an unconstitutional taking. 467 U.S. at 998-99. In the context of a takings claim against the federal government, however, the Tucker Act provides the exclusive procedural mechanism for pursuing compensation. It also provides a federal forum for the resolution of such cases.[6]

The Court in *Monsanto* considered whether the company could bring its Tucker Act suit immediately or first had to exhaust FIFRA's remedial provisions, which required the company to participate in settlement or arbitration proceedings. *Id.* at 1018-19. Seeking to reconcile the two statutory remedies, the Court stated that "FIFRA does not withdraw the possibility of a Tucker Act remedy, but merely requires that a claimant first seek satisfaction through the statutory procedure." *Id.* at 1018. The Court explained that "[e]xhaustion of the statutory [FIFRA] remedy is necessary to determine the extent of the taking that has occurred. To

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Ninth Circuit has drawn from *Williamson County* presents just such a circumstance.

[6] The Tucker Act provides, in part: "The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution, or any Act of Congress." 28 U.S.C. § 1491. The Tucker Act thus specifies *which* federal forum is available; by no means does the statute deprive the property owner of a federal forum — the unfortunate and unnecessary result in this case.

the extent the operation of the statute provides compensation, no taking has occurred and the original submitter has no claim against the government." *Id.*

The Court in *Williamson County*, relied on *Monsanto* to conclude that:

> taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

473 U.S. at 195.

Monsanto's holding was not so broad. The Court did not require that the company "avail[] itself of the process provided by the *Tucker Act*," *id.* at 195 (emphasis added); the Court's analysis focused only on the requirements of *FIFRA*. But for the settlement/arbitration provisions of FIFRA, a Tucker Act claim would have been immediately available. Unlike the extended administrative and state court proceedings required to ripen a taking claim under *Williamson County*, a Tucker Act claim is ripe as soon as a remedy is denied under the challenged statute. *See Monsanto*, 467 U.S. at 1018.

Monsanto, therefore, provides no basis for *Williamson County*'s conclusion that the Fifth Amendment requires a property owner to first seek compensation in state court. If anything, *Monsanto*'s rule leads to a reading of *Williamson County* in which a takings claim against a state or local government is ripe when the administrative agency has rendered a final determination as to the challenged

regulation. *Williamson County* should not be read as extending the holding in *Monsanto* that the company had to exhaust FIFRA's remedial provisions as equivalent to its state court litigation requirement.[7]

The other case cited in *Williamson County* for the state court exhaustion principle, *Parratt v. Taylor*, 451 U.S. 527 (1981), was a Due Process Clause decision and likewise does not support reading a state litigation requirement into the Fifth Amendment. In *Parratt*, the Court held that a prisoner's due process claim under § 1983 was not ripe until the prisoner exhausted the adequate post-deprivation remedy provided by state law. *Id.* at 543. The Court in *Williamson County* explained that "[a] person . . . does not state a claim under the Due Process Clause merely by alleging the deprivation of property," and that "the Constitution is satisfied by the provision of meaningful process." 473 U.S. at 195 ("[A] state's action is not complete [in the sense of causing a constitutional injury] unless or until the state fails to provide an adequate postdeprivation remedy for the property loss.") (citing *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)). *Parratt* does not require that a party pursue all available state-court remedies. Reading a state litigation requirement into *Williamson County* thus fails to recognize the fundamental distinction between the Takings Clause and the Due Process Clause: The Takings Clause requires more than just adequate *process*, it guarantees a *result* —specifically, the fair value, in money, of the property taken. *See United States v. Miller*, 317 U.S. 369,

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[7] The *Monsanto* decision hinged on the specific provisions of FIFRA. The exhaustion requirement the Court announced may well be inapplicable to federal government actions taken pursuant to other, if not most, statutes. "Generally, an individual claiming that the United States has taken his property can seek just compensation under the Tucker Act." 467 U.S. at 1017.

379-80 (1943); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984).[8]

Second, the state litigation requirement that the courts of appeals have drawn from *Williamson County* has had the unintended and unfair consequences of completely depriving property owners of a federal-court remedy for violation of their Fifth Amendment rights.

The long-established rules of claim and issue preclusion bar the relitigation of claims or issues in federal court once a state court decides them. These doctrines are a "fundamental rule of law that serve an important public interest by ensuring a decisive end to litigation." 18 James Wm. Moore et al., Moore's Federal Practice 131.12[1] (Matthew Bender 2003) (citing *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1979) ("The doctrine of res judicata serves vital public interests . . . This Court has long recognized that '[public] policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once

[8] *Parratt* is distinguishable on its facts, as well. The challenged conduct in *Parratt* was "a random and unauthorized act by a state employee." 451 U.S. at 541. This circumstance made provision of a pre-deprivation hearing "impossible or impracticable" and led to the conclusion that resort to a state's post-deprivation remedial process was sufficient and necessary. *Williamson County*, 473 U.S. at 195. As a consequence of this "random act" predicate, *Parratt* has no applicability to situations "in which the deprivation of property is effected pursuant to an established state policy or procedure, [because in such cases] the state could provide predeprivation process." *Id.* at 195 n.14. Because a taking of private property is presumably effected pursuant to an established policy or procedure, *Parratt*'s post-deprivation process rule is inapplicable in the takings arena.

tried shall be considered forever settled as between the parties . . . '")).[9]

Circuit courts have applied these principles to hold that once a takings case is litigated in state court, it cannot be relitigated in federal court. *See, e.g., Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment*, 178 F.3d 1295 (6th Cir. 1999) (affirming district court's dismissal of takings claim adjudicated in state court based on res judicata), *cert. and reh'g denied*, 528 U.S. 871 (1999); *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998); *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) (affirming district court's dismissal of a takings claim adjudicated in state court based on issue preclusion); *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319 (10th Cir. 1998); *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992); *Peduto v. City of North Wildwood*, 878 F.2d 725 (3d Cir. 1989). *See also* John J. Delaney and Duane Desiderio, *Who Will Clean Up The "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195, 203 (1999) ("[P]roperty owners received no resolution of their taking claims in 83 percent of [federal] District Cases [from 1990-

[9] Yet, this Court's decision in *Williamson County* only prolongs litigation. It effectively requires that a would-be federal takings plaintiff challenge the allegedly unconstitutional state action twice — once in state court, once in federal court. In other words, far from discouraging the "second bite of the apple" that the preclusion doctrines are intended to prevent, *Williamson County* force feeds it. Courts thus have had to choose between traditional rules of preclusion and district court jurisdiction on the one hand and *Williamson County*'s state litigation requirement on the other.

1998]").[10] As this case demonstrates, a federal taking claim may be barred, even when a state court expressly decides only state-law issues.

Relatedly, courts have employed the *Rooker-Feldman* doctrine to deprive *Williamson County* state-court litigants of federal just compensation remedies. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). These cases together stand for the proposition that parties aggrieved by a state-court decision cannot appeal that decision to a federal district court; rather, they must petition for a writ of certiorari from the United States Supreme Court. *See generally* Susan Bandes, *The Rooker-Feldman Doctrine: Evaluating Its Jurisdictional Status*, 74 Notre Dame L. Rev. 1175 (1999). *See, e.g.*, *Wilkinson*, 142 F.3d at 1324-25 (stating the ripeness requirement in a federal takings claim is insufficient to preclude application of res judicata and collateral estoppel principles, and *Rooker-Feldman* doctrine precludes federal courts from reviewing state court judgments); *Gash Assoc. v. Village of Rosemount*, 995 F.2d 726, 728-29 (7th Cir. 1993) (holding that under *Rooker-Feldman*, federal takings plaintiffs cannot file collateral attacks on state court's civil judgments in federal district court, but instead must seek review in the Supreme Court); *Adams Outdoor Advertising v. City of East Lansing*, 2001 U.S. Dist. LEXIS 5549, *1, 12-15 (W.D. Mich. 2001) (granting summary judgment to municipal takings defendant based on *Rooker-Feldman* doctrine). *Rooker-Feldman*, therefore, represents another means by which a state litigation requirement applied by the courts of appeals deprives takings litigants of their day in federal court.[11]

In sum, the requirement of duplicative adjudication of the same claim, in addition to being a time-wasting hurdle for the courts and litigants even when a federal claim is allowed, often altogether bars federal courts from reviewing plaintiffs' Fifth Amendment claims for just compensation. In fact, between 1990 and 1997, federal courts, citing *Williamson County*, declined to review over 90 percent of all cases that dealt with land-use takings issues. Alex F. Annett, The Heritage Foundation, *How Congress Can End the "Regulatory Limbo" Blocking Property Owners' Access*

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[10] The Third, Sixth and Tenth Circuits have been the most strict in applying the doctrine of res judicata to prevent litigants from trying to exercise their rights under the Fifth Amendment and 42 U.S.C. § 1983. *See, e.g., Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 (10th Cir. 1998); *Peduto v. City of North Wildwood*, 878 F.2d 725, 726-728 (3d Cir. 1989).

The Second, Fourth, Fifth and Eleventh Circuits avoid res judicata by allowing property owners to file initially in federal court while filing a "reservation" in state court. This "reservation" allows the state court to hear issues of state law while reserving federal constitutional issues to be decided later by a federal trial. *See, e.g., Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 130, 130 n.7 (2d Cir. 2004); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998); *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir. 1976).

The Ninth Circuit has vacillated about which approach to take. It hinted at accepting the approach of the Fourth and Eleventh Circuits in *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) (*Dodd I*). However, in *Dodd II* it went back to its old approach of invoking res judicata. *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) (*Dodd II*). The Ninth Circuit relied on *Dodd II* in the instant case in holding that issue preclusion barred petitioners' federal takings claim. *San Remo Hotel, L.P. v. San Francisco City and County*, 364 F.3d 1088, 1095 (9th Cir. 2004).

[11] The Third Circuit recently expanded *Rooker-Feldman* further to apply to any federal case in which the parties are the same and the claims are similar. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 364 F.3d 102, 104 (3d Cir. 2004), *cert. granted*, 125 S.Ct. 310 (2004).

to Justice, FYI No. 154 October 1, 1997. No other federally-protected right is so encumbered by a state litigation requirement or other preconditions to federal litigation. *See, e.g.*, Gregory M. Stein, *Regulatory Takings and Ripeness in Federal* Courts, 48 Vand. L. Rev. 1, 23 (1995) ("The state compensation portion of [*Williamson*] finds no parallel in the ripeness cases from other areas of the law."). And no other class of federal constitutional plaintiffs are so routinely shut out of the federal courthouse. *See* Michael M. Berger, *Supreme Bait & Switch*, 2 Wash. U. J.L. & Pol'y, at 124.

The Court should disavow any reading of *Williamson County* that requires such a result. For one thing, it is anomalous to suggest that a right guaranteed by the United States Constitution may not be litigated in federal court. *See Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."); *Jacobs v. United States*, 290 U.S. 13, 15 (1933) (stating that an inverse condemnation suit rests on the Fifth Amendment and is therefore based on the Constitution: "The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary.").

Furthermore, no such intention can reasonably be gleaned from the Court's language in *Williamson County*. There, in concluding that respondent's claim was "*premature*," 473 U.S. at 185 (emphasis added), the Court explained that respondent "has not *yet*" complied with the Court's ripeness requirements, *id.* at 186 (emphasis added), and that its federal claim "[will] not be ripe *until*" it does so, *id.* at 495 (emphasis added). This, of course, is logical: the

doctrine of ripeness seeks to postpone consideration of claims where to do so would be premature. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998) (stating that withholding consideration of petitioner's claim would not cause significant hardship because respondent would have "ample opportunity to bring its legal challenge [at a later time]"). But ripeness should not be used to preclude parties from bringing claims at all.

Recognizing the gravity of the current state of affairs for takings plaintiffs, some circuits have crafted exceptions to the preclusion and *Rooker-Feldman* doctrines for plaintiffs who unwillingly litigate their takings claims in the first instance in state court pursuant to *Williamson County*. *See, e.g., DLX, Inc.*, 381 F.3d at 518 n.3 (refusing to apply *Rooker-Feldman* to bar petitioner's takings claim: "*Williamson County* . . . clearly contemplates that a takings plaintiff who loses her claim in state court will have a day in federal court"); *Santini*, 342 F.3d at 130, 130 n.7 (holding that, notwithstanding preclusion and *Rooker-Feldman* doctrines, federal courts may hear takings cases where petitioners pursue their inverse condemnation action in state court to comply with *Williamson County* but reserve their federal claim pursuant to *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411 (1964)); *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225 (11th Cir. 1999), *cert. denied*, 531 U.S. 815 (2000) (rejecting applicability of *Rooker-Feldman* doctrine in takings case where litigation in state court was necessitated by *Williamson County*); *cf. Anderson v. Charter Township of Ypsilanti*, 266 F.3d 487, 497 (6th Cir. 2001) (holding that *Rooker-Feldman* bars federal takings claim where plaintiff brought both federal and state takings claims in state court and, after removal and remand, failed to reserve federal claim).

This piecemeal approach, whereby circuit courts seek to circumvent the harsh effects of *Williamson County*, is inadequate to address the inequities leveled against takings plaintiffs throughout the country who seek federal guardianship of their Fifth Amendment rights from state and local regulatory decisions. The current ripeness procedure required by some circuit courts of appeal in the name *Williamson County* compromises the efficient functioning of the court system and simultaneously undermines a fundamental constitutional right.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T&R INVESTMENT CORP.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF EQUITY LIFESTYLE PROPERTIES, INC., CALIFORNIA MOBILEHOME PARKOWNERS ALLIANCE, THE MANUFACTURED HOUSING EDUCATIONAL TRUST OF ORANGE, RIVERSIDE AND SAN BERNARDINO COUNTIES, AND MANUFACTURED HOUSING EDUCATIONAL TRUST OF SANTA CLARA COUNTY IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE NINTH CIRCUIT'S ISSUE-PRECLUSION HOLDING WOULD EFFECTIVELY PRECLUDE PROPERTY OWNERS FROM PRESENTING TAKINGS CLAIMS IN FEDERAL COURT	5
II. THE NINTH CIRCUIT'S HOLDING WOULD BE ESPECIALLY PERNICIOUS FOR OWNERS OF RENT CONTROLLED MOBILEHOME PARKS	14
III. CALIFORNIA'S IMPOSITION OF RENT CONTROL ON MOBILEHOME PARKS DEMONSTRATES THAT THE NINTH CIRCUIT'S HOLDING WOULD FORECLOSE VALID TAKINGS CLAIMS FROM BEING LITIGATED ON THEIR MERITS IN FEDERAL COURT	21
IV. *WILLIAMSON COUNTY* SHOULD BE HELD INAPPLICABLE TO "AS APPLIED" REGULATORY TAKINGS CLAIMS WHERE "JUST COMPENSATION" IS IRRELEVANT	24
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

American Mannex Corp. v. Rozands, 462 F.2d 688 (5th Cir. 1972) 13

Brown v. Legal Foundation, 538 U.S. 216 (2003) 26

Carson Harbor Village Ltd. v. City of Carson, 37 F.3d 468 (9th Cir. 1994) 27

Casella v. City of Morgan Hill, 280 Cal. Rptr. 876 (Ct. App. 1991) 9

Cashman v. City of Cotati, 374 F.3d 887 (9th Cir. 2004) 9, 22, 23, 28, 29

Chevron USA v. Cayetano, 224 F.3d 1030 (9th Cir. 2000) 9

Chevron USA, Inc. v. Lingle, 363 F.3d 846 (9th Cir.), *cert. granted*, __ U.S. __ (2004) 9

City of Cotati v. Cashman, 52 P.3d 695 (Cal. 2002) 23

DLX, Inc. v. Kentucky, 381 F.3d 511 (6th Cir. 2004) 11, 12

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) ..... *passim*

Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299 (11th Cir. 1992) 8, 12, 14

Front Royal & Warrant County Indust. Park Corp. v. Town of Front Royal, 135 F.3d 275 (4th Cir. 1998) 12

Galland v. City of Clovis, 16 P.3d 130 (Cal. 2001) 15, 28

TABLE OF AUTHORITIES – Continued

Page

Haas v. County of San Bernardino, 45 P.3d 280 (Cal. 2002) 18

Hacienda Valley Mobile Estates v. City of Morgan Hill, 343 F.3d 651 (9th Cir. 2003) ..... *passim*

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 26, 27, 28

Hensler v. City of Glendale, 876 P.2d 1043 (Cal. 1994) 20

Kavanau v. Santa Monica Rent Control Board, 941 P.2d 851 (Cal. 1997) 15, 16, 20, 28

Levald, Inc. v. City of Palm Desert, 998 F.3d 680 (9th Cir. 1993) 24

MHC Operating Limited Partnership v. City of San Jose, 130 Cal. Rptr. 2d 564 (Ct. App. 2003) 19, 20

Migra v. Warren City Sch. Dist., 465 U.S. 75 (1984) 13, 14

Montclair Park Owners Ass'n v. City of Montclair, 90 Cal. Rptr. 2d 598 (Ct. App. 1999) 9, 21

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 25

Patsy v. Board of Regents of Florida, 457 U.S. 496 (1982) 14, 15, 19

Red Fox v. Red Fox, 564 F.2d 361 (9th Cir. 1977) 13

Richardson v. City & County of Honolulu, 124 F.3d 1150 (9th Cir. 1997) 9

San Remo Hotel v. City & County of San Francisco, 145 F.3d 1095 (9th Cir. 1998) 5, 6

San Remo Hotel, L.P. v. City & County of San Francisco, 41 P.3d 87 (Cal. 2002) 6, 20

TABLE OF AUTHORITIES – Continued

Page

Sandpiper Mobile Village v. City of Carpinteria, 12 Cal. Rptr. 2d 623 (Ct. App. 1992) 9

Santa Monica Beach Ltd. v. Superior Court, 968 P.2d 993 (Cal. 1999) 9

Santini v. Conn. Hazardous Waste Management Service, 342 F.3d 119 (2d Cir. 2003) 8, 11, 12

Tumey v. Ohio, 273 U.S. 510 (1927) 18

Ward v. Village of Monroeville, 409 U.S. 57 (1972) 4, 18, 19

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) ..... *passim*

Yee v. City of Escondido, 503 U.S. 519 (1992) 5, 22, 23, 24, 27

STATUTES

28 U.S.C. § 1738 13

Act of May 26, 1790, c. 11, 1 Stat. 122 13

California Code of Civil Procedure § 425.16 23

Title 17, Chapter 17.22, San Jose Municipal Code § 17.22.050 18

Title 20, San Rafael Municipal Code § 20.12.060 18

MISCELLANEOUS

Laurence H. Tribe, *American Constitutional Law* (3d ed. 2000) 27

Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 Va. L.Rev. 1360 (1967) 13

TABLE OF AUTHORITIES – Continued

Page

Section 86, of the Restatement (Second) of Judgments 10, 11, 13

Wright & Miller, *Federal Practice & Procedure*, (2d ed. 1988) 6, 13

INTERESTS OF *AMICI CURIAE*[1]

Amicus Equity Lifestyle Properties, Inc. ("ELS") is the nation's largest provider of housing for retirees, seasonal and second home-owners, and recreational vehicle owners. ELS has a controlling interest in 270 communities located in 25 states and representing over 100,000 sites. ELS rents its sites to owners of factory-built housing, including manufactured homes, park models, and mobile homes. ELS is a publicly traded real estate investment trust (REIT) that must distribute over 90% of its income annually to its shareholders. ELS shareholders include pension funds, retirees, and other individuals who depend upon income from these investments. ELS has a fiduciary duty to its shareholders to maximize the value of their investment in ELS by charging rents that reflect the value of the real estate in which ELS has invested on their behalf.

More particularly for present purposes, ELS owns over 20 properties in California, of which 13 (representing over 3,700 sites) are currently subject to rent control ordinances. These ordinances limit annual rental increases to the annual increase in the CPI or a fraction thereof – or, in some cases, to no increase at all. ELS estimates that, if these ordinances are constitutional, hundreds of millions of dollars of value will have been taken from its shareholders and transferred to the residents in these communities. ELS has initiated litigation in

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[1] All parties have consented to the filing of this *amici curiae* brief. No counsel for any of the parties authored any part of this brief. No person or entity other than the *amici* submitting this brief has made any monetary contribution to the preparation or submission of this brief.

at least five California jurisdictions challenging their rent control ordinances.

Amicus California Mobilehome Parkowners Alliance ("CMPA") is the second largest state-wide association of park owners, dealers, and service and industry representatives. CMPA has been representing the manufactured housing industry for over 15 years. It advocates on behalf of service and industry members and owners of communities consisting of tens of thousands of home sites in numerous mobile home parks in California.

Amicus The Manufactured Housing Educational Trust of Orange, Riverside and San Bernardino Counties ("MHET") was incorporated in 1982 as a non-profit trade association representing the owners of mobile home and manufactured housing communities in the Southern California counties of Orange, Riverside, and San Bernardino. There are over 840 mobile home parks and manufactured housing communities in this tri-county area. MHET is dedicated to promoting the manufactured housing and mobile home business industry and to educating manufactured and mobile home owners, community leaders, and the public about manufactured housing community and mobile park issues.

Amicus Manufactured Housing Educational Trust of Santa Clara County ("Santa Clara MHET") is a separate association representing the owners of mobile home and manufactured housing communities within Santa Clara County, California. There are a large number of manufactured home communities in the county, notably located in San Jose (more than 10,000 sites in almost 60 properties), Sunnyvale (almost 4,000 sites in 14 properties), and Mountain View (about 1,800 sites in six communities).

Therefore, *amici* have a unique perspective on the central issue before the Court: whether property owners entitled to litigate Fifth Amendment taking claims in federal district court, but who may be forced by *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), to first ripen such claims in local proceedings, are subject to issue preclusion upon their promised return to federal district court. While all property owners would be sorely prejudiced by the Ninth Circuit's holding on this issue below – effectively nullifying *Williamson County's* promise of a post-ripening federal forum – the Ninth Circuit's holding would be uniquely prejudicial to *amici* because of the unique strictures of mobilehome rent control ordinances in California.

If the Ninth Circuit's holding below were affirmed, owners of rent controlled mobilehome parks would not merely lose their promised federal forum. The preclusive rulings supplanting that forum would emanate from local administrative regimes that are structurally biased against mobilehome park owners in general and their Fifth Amendment claims in particular. At the behest of potent constituencies – mobilehome owners who are tenants in mobilehome parks – local governments throughout California not only legislate and prosecute rent control cases against mobilehome park owners but also hire the "neutral" hearing officers who decide those cases. Accordingly, only an independent federal district court unrestricted by issue preclusion can provide a neutral adjudication of mobilehome park owners' Fifth Amendment taking claims.

Amici and a group of leading economists submitted an *amici curiae* brief in *Lingle v. Chevron USA, Inc.*, docket No. 04-163, now pending before the Court.

SUMMARY OF ARGUMENT

Section I of this brief will demonstrate that the Ninth Circuit's holding below is irreconcilable with *Williamson County's* promise of a federal forum for Fifth Amendment taking claims. *Williamson County* required certain of those claims to be ripened by local proceedings before the claims could be entertained in federal district court. The necessary implication of that holding was that after the local ripening process the federal district court would fully adjudicate the merits of the deferred claim. But the Ninth Circuit's holding would transform the local ripening requirement into a local killing field which would eliminate the right to litigate the claims in the federal forum. *Williamson County's* promise of a federal forum would be nugatory if rulings made during the local ripening process had issue-preclusive effect in the federal district court.

Section II of this brief will document the unique harm that the Ninth Circuit's erroneous holding would inflict on property owners subject to mobilehome rent control ordinances. Not only would they lose their federal forum, as other property owners would, but the federal forum would be supplanted by preclusive rulings emanating from local proceedings that are structurally biased against the Fifth Amendment claimant. Nor is administrative or judicial review an adequate cure for structural bias at the initial decision making stage. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

Section III of this brief will demonstrate that California's unique imposition of rent control on mobilehome parks creates numerous constitutional issues. If the Ninth Circuit's holding is permitted to stand, these meritorious

constitutional claims will never be litigated on their merits in an Article III court.

Finally, Section IV of this brief will demonstrate that, in addition to reversing the Ninth Circuit's holding below, this Court should clarify or limit *Williamson County* to avoid similar prejudice to Fifth Amendment claimants. In *Yee v. City of Escondido*, 503 U.S. 519 (1992), this Court held that exhaustion under *Williamson County* is never required for "facial" takings claims and this holding is equally applicable to "as applied" takings claims which challenge whether the regulation at issue substantially advances any legitimate state interest. *Williamson County's* requirement of pursuing "Just Compensation" at the state level, has no application to Fifth Amendment claims that a local government has taken private property without substantially advancing any legitimate public purpose. (*See* ELS's *amici's* separate brief in *Lingle v. Chevron USA, Inc.*, docket No. 04-163.) Because such a taking is unlawful *ab initio*, the "Just Compensation Clause" of the Fifth Amendment never comes into play. Accordingly, there is utterly no reason to apply *Williamson County* to this type of claim.

ARGUMENT

I. THE NINTH CIRCUIT'S ISSUE-PRECLUSION HOLDING WOULD EFFECTIVELY PRECLUDE PROPERTY OWNERS FROM PRESENTING TAKINGS CLAIMS IN FEDERAL COURT

The salient facts of this case are that the Ninth Circuit first told petitioners to ripen their federal claims by exhausting state judicial remedies, *San Remo Hotel v.*

City & County of San Francisco, 145 F.3d 1095, 1102 (9th Cir. 1998); petitioners duly preserved their federal claims under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964); and the California Supreme Court expressly acknowledged their *England* reservation. *San Remo Hotel, L.P. v. City & County of San Francisco*, 41 P.3d 87, 91 n.1 (Cal. 2002). Nonetheless, the Ninth Circuit held that petitioners' promised return to federal district court was in vain because their claims were foreclosed by the state supreme court's decision.

This Court adopted the *England* reservation in the analogous situation of federal plaintiffs forced into state court by *Pullman* abstention. In that context, the Court stated plainly: "When the reservation has been made . . . his right to return [to federal court] will in all events be preserved." *England*, 375 U.S. at 421-22.

Wright & Miller have articulated the essence of *England*'s promise of a right to return to federal court "in all events":

> A party who clearly reserves federal questions following "Pullman" abstention for state-court resolution of state-law issues can return to federal court for decision of the federal issues, *free of preclusion*. (Emphasis added).

18B Wright & Miller, *Federal Practice & Procedure* § 4471 p. 247 (2d ed. 1988). That same freedom from preclusion is equally essential to fulfill the promise of *Williamson County*.

Justice Brennan's analysis in *England* emphasized that federal constitutional claimants cannot be forced to accept a state court's determination of their federal claims:

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."

England, 375 U.S. at 415 (citations and quotations omitted).

England went on to explain why this Court's certiorari review of a state appellate court's final adjudication is no substitute for an original adjudication of constitutional issues in the federal district courts:

> Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.

Id. at 416-17 (citations and quotations omitted).

That rationale applies *a fortiori* to the case of mobile-home rent control. As demonstrated in Section II, the rulings the Ninth Circuit proposes to beclothe with preclusive effect

emanate from an administrative regime that is structurally biased against the mobilehome park owner. The need for independent adjudication of Fifth Amendment claims by the federal district court is all the more critical in that context.

Furthermore, the Ninth Circuit's holding is irreconcilable with *England*'s emphasis on fact findings as well as legal rulings by the federal district court. That dual emphasis would be nullified if post-*Williamson County* cases in federal court were subject to either issue or claim preclusion based on involuntary state court proceedings. Nor can *Williamson County* be distinguished for present purposes from *Pullman* abstention. The coercive state court proceedings would have exactly the same preclusive effect. As the Second Circuit held in *Santini v. Conn. Hazardous Waste Management Service*, 342 F.3d 119, 129 (2d Cir. 2003), and the Eleventh Circuit in *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992): "The operation of [*Williamson County*], much like the abstention doctrine at issue in *England*, forces would-be federal court litigants to first litigate their claims in state court." *Fields*, 953 F.2d at 1104.

The Ninth Circuit's contrary holding is also extremely unfair. *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 343 F.3d 651 (9th Cir. 2003), affirmed the dismissal of a takings claim on *Williamson County* ripeness grounds even though the California courts had consistently rejected the takings theory in question, which has been adopted by the Ninth Circuit.[2] *Id.* at 658-61. In sending

[2] As explained in the *amici* brief in *Lingle*, the Ninth Circuit, applying this Court's regulatory takings jurisprudence, has recognized that regulatory schemes that create a "premium" do not substantially

(Continued on following page)

the case off to the state courts for ripening, the Ninth Circuit assured the plaintiff that its eventual return to federal district court would not be burdened by any issue or claim preclusion:

> We are sympathetic to Hacienda's concerns about issue preclusion and res judicata, but we believe that Hacienda may reserve its federal claims while it pursues its state remedies. If the California courts do apply an unconstitutionally deferential standard of review, Hacienda's federal taking claim will not be precluded on appeal to federal courts because the issue will not have been properly litigated in state court.

Id. at 661. In the case below, however, the same Circuit has held to the contrary. It was right the first time, in *Hacienda*.

advance legitimate state interests. *See Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1165-66 (9th Cir. 1997); *Chevron USA v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000); *Chevron USA, Inc. v. Lingle*, 363 F.3d 846 (9th Cir.), *cert. granted*, ___ U.S. ___ (2004); *Cashman v. City of Cotati*, 374 F.3d 887 (9th Cir. 2004). In contrast, California courts have repeatedly and consistently rejected this Court's "substantially advances" standard and all premium-based theories. *See Santa Monica Beach Ltd. v. Superior Court*, 968 P.2d 993, 1001-05 (Cal. 1999) (expressly rejecting the "substantially advance" standard for rent control cases and opting for lesser standard); *Montclair Park Owners Ass'n v. City of Montclair*, 90 Cal. Rptr. 2d 598, 603-06 (Ct. App. 1999) ("There is good reason for not following the Ninth Circuit" in *Richardson*); *Sandpiper Mobile Village v. City of Carpinteria*, 12 Cal. Rptr. 2d 623, 627-29 (Ct. App. 1992); *Casella v. City of Morgan Hill*, 280 Cal. Rptr. 876, 884-85 (Ct. App. 1991) (refusing to apply the "substantially advances" test to the vacancy control provisions of a mobilehome rent control ordinance, even though those provisions caused the transfer of "premiums" to tenants).

The holding below is also flatly contrary to the Restatement rule. The authors of the Restatement concluded that federal courts should not give preclusive effect to state court proceedings if doing so would interfere with a "scheme of federal remedies." Section 86, of the Restatement (Second) of Judgments ("Section 86") reads:

> § 86 Effect of State Court Judgment in a Subsequent Action in Federal Court
>
> A valid and final judgment of a state court has the same effects under the rules of res judicata in a subsequent action in a federal court that the judgment has by the law of the state in which the judgment was rendered, except that:
>
> (1) An adjudication of a claim in a state court does not preclude litigation in a federal court of a related federal claim based on the same transaction if the federal claim arises under a scheme of federal remedies which contemplates that the federal claim may be asserted notwithstanding the adjudication in state court; and
>
> (2) A determination of an issue by a state court does not preclude relitigation of that issue in federal court if according preclusive effect to the determination would be incompatible with a scheme of federal remedies which contemplates that the federal court may make an independent determination of the issue in question.

By its terms, Section 86 addresses both claim preclusion (paragraph 1) and issue preclusion (paragraph 2). Moreover, Comment f to Section 86 broadly embodies *England* by citing situations where a federal claim is expressly reserved in state court. Comment f states that, even if the state court "decides the federal claim despite

claimant's endeavor to withhold it, that decision does not necessarily foreclose redetermination by the federal court." The Reporter's Notes to Comment f cite *England* as an example of the withholding of a federal claim.

Williamson County involves a "scheme of federal remedies" within the meaning of Section 86: certain plaintiffs wishing to assert takings claims must first go to state court before returning to federal court. Nor does anything in *Williamson County* suggest a departure from the Restatement rule. Accordingly, this Court should expressly adopt that rule now as to state court proceedings required under *Williamson County* – whether the plaintiff is returning to federal court after a ripeness dismissal or, as is often the case, a plaintiff ripens its takings claim in state court in the first instance. *See, e.g., DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004) (because of *Williamson County*, takings plaintiff initially filed suit in state court in order to exhaust state remedies).

Alternatively, this Court may wish to adopt the approach taken by the Second Circuit in *Santini v. Conn. Hazardous Waste Management Service*, 342 F.3d 119, 127-30 (2d Cir. 2003). The Second Circuit in *Santini* allows plaintiffs to exhaust their state remedies, as required by *Williamson County*, while at the same time reserving their federal claims for resolution in federal court by asserting an *England* reservation. *Id.*

> It would be both ironic and unfair if the very procedure that the Supreme Court required Santini to follow before bringing a Fifth Amendment takings claim – a state-court inverse condemnation action – also precluded Santini from ever bringing a Fifth Amendment takings claim. We do not believe that the Supreme Court intended in *Williamson*

> *County* to deprive all property owners in states whose takings jurisprudence generally follows federal law (*i.e.*, those to whom collateral estoppel would apply) of the opportunity to bring Fifth Amendment takings claims in federal court. Thus, in permitting state-court litigants to reserve their federal takings claims for determination in subsequent federal-court actions, we decline to interpret *Williamson County* in such a way as to deprive a large class of prospective plaintiffs of federal forums for their federal takings claims.

Id. Here, the application of the *Santini* rule is even more compelling because, as noted above, California courts do *not* follow federal takings law. *See* footnote 2, *supra*.

The Eleventh and Fourth Circuits have adopted similar approaches, *see Fields*, 953 F.2d at 1305-06; *Front Royal & Warrant County Indust. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998), and the Sixth Circuit recently adopted the same rule for claim preclusion (although it did not address the issue for issue preclusion). *DLX, Inc.*, 381 F.3d at 523. If this Court adopts this approach, its decision should be applied *prospectively* so that property owners who have already exhausted their state remedies, without explicitly asserting an *England* reservation, are not precluded from later asserting their federal claims by their failure to make an *England* reservation. *See Santini*, 342 F.3d at 130 ("Although Santini did not make such a reservation in Connecticut state court, we apply the reservation requirement prospectively only, and we deem Santini, who neither litigated his federal claim in state court nor sought to do so, to have reserved his federal claim").

Nothing in the full faith and credit statute (28 U.S.C. § 1738) dictates, or even supports, the Ninth Circuit's holding. Judge Wisdom held more than 30 years ago that "other well-defined federal policies, statutory or *constitutional*, may compete with [the] policies underlying" the full faith credit statute and, thus, a state court judgment need not always be given preclusive effect. *American Mannex Corp. v. Rozands*, 462 F.2d 688, 690 (5th Cir. 1972) (Wisdom, J.) (emphasis added). *See also*, *Red Fox v. Red Fox*, 564 F.2d 361, 365 n.3 (9th Cir. 1977) (competing federal policies justify departure from the full faith and credit statute); Restatement (Second) of Judgments § 86 Rptr. Notes comm. d (collecting cases "finding an exception" to the full faith and credit statute); 18B Wright & Miller, *supra*, § 4469 n.14 (same); Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 Va. L.Rev. 1360, 1384 (1967) (noting that federal policies may support not giving preclusive effect to state court proceedings if a "federal purpose or interest" would be undermined).

Moreover, the full faith and credit statute is almost as old as Article III courts themselves, having originally been adopted as part of the Act of May 26, 1790, c. 11, 1 Stat. 122. 18B Wright & Miller, *supra*, §§ 4467 n.10 & 4468 n.12 (explaining legislative history). This Court was obviously aware of the full faith and credit statute when it decided *Williamson County*; yet that decision plainly promises plaintiffs a full airing of their claims in federal court notwithstanding prior state court proceedings.

Nor does *Migra v. Warren City Sch. Dist.*, 465 U.S. 75 (1984) compel a different result. As noted by the Eleventh Circuit in *Fields*, Justice Blackmun in *Migra* cautioned that the Court's holding was based on the voluntary

nature of the state court action at issue. Justice Blackmun distinguished that situation from one where a federal court litigant is involuntarily forced into state courts. *Fields*, 953 F.3d at 1304 (*citing Migra*, 465 U.S. at 85 n.7). Indeed, Justice Blackmun in *Migra* expressly referred to an *England* reservation and noted that "the plaintiff can preserve his right to a federal forum for his federal claims by informing the state court of his intention to return to federal court on his federal claims following litigation of his state claims in state court." *Id. Williamson County* has created an entire class of property owners involuntary forced into state court litigation, either in the first instance or, as in this case, after being directed to do so by a federal court.

For all the foregoing reasons, the Ninth Circuit's application of issue preclusion in this case was erroneous and should now be reversed.

II. THE NINTH CIRCUIT'S HOLDING WOULD BE ESPECIALLY PERNICIOUS FOR OWNERS OF RENT CONTROLLED MOBILEHOME PARKS

We have already cited this Court's holding in *England*, 375 U.S. at 416, that the essence of adjudication is "constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims." For that reason, *where* the dispositive facts are found is equally important. Notably, *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982), rejected an exhaustion-of-state-remedies requirement for § 1983 actions in part because of Congressional "mistrust . . . for the fact-finding processes of state institutions. . . . This [1871] Congress believed that federal courts would be less susceptible

to local prejudice and to the existing defects in the fact-finding processes of the state courts." *Id.* at 506.

Patsy also held that the foregoing concern was even more pronounced when the suspect local adjudication begins at the administrative level. "This perceived defect in the States' factfinding processes is particularly relevant to the question of exhaustion of administrative remedies: exhaustion rules are often applied in deference to the superior factfinding ability of the relevant administrative agency." *Id.* Simply stated, a biased administrative forum is even more dangerous to § 1983 claimants than a biased judicial forum.

But if the Ninth Circuit's holding below were upheld, owners of rent controlled mobilehome parks would be subjected to the worst of all worlds: issue-preclusive rulings emanating from biased local administrative regimes. A distinguished member of the California Supreme Court, Justice Janice Rogers Brown, has likened § 1983 claims of local racial prejudice to § 1983 claims of local prejudice against mobilehome park owners in California. Justice Brown argued that, in both situations, "a fair resolution of a constitutional breach cannot include sending an aggrieved party back to the same administrative system that caused the injury in the first place. On the contrary, the driving purpose of section 1983 is to get the plaintiff out of the corrupt state system where constitutional rights are being violated and into federal court where wrongs can be fairly redressed." *Galland v. City of Clovis*, 16 P.3d 130, 162-63 (Cal. 2001) (Brown, J., dissenting) (dissenting from holding that a § 1983 action may not be maintained in California state courts until a controversial administrative remedy created by *Kavanau v. Santa*

Monica Rent Control Board, 941 P.2d 851 (Cal. 1997) has been exhausted).

The very existence of mobilehome rent control ordinances throughout California reflects the local political power of mobilehome owners who rent their coach space and related amenities from the park owner. ELS's park in San Rafael, California, for example, currently houses 659 people – a significant voting bloc in a town where only 9,703 votes were cast in the last mayoral election.[3] The electoral power of mobilehome owners is even stronger in other rent control jurisdictions like Santee, California, where ELS's park is only one of eleven such properties.[4] In a larger city like San Jose, California, its 10,658 mobile homes[5] generate a potent political force for aggressive rent control policies.

Even more pointedly, the combined voting force of mobilehome owners and their subtenants vastly outweighs the tiny number of park owners in any local jurisdiction. A corporate, out-of-state park owner like ELS weighs even lighter on the political scales. Beyond the lack of a vote, such an owner is all too easily demonized as a "rapacious" outsider subjugating its allegedly poor and vulnerable local tenants.

Political attacks along that line also resonate with the general population of renters. In San Jose, renter-occupied units in the 2000 census represented 42% of all housing

[3] *See* the League of Women Voters of California's "Smart Voter" website at http://www.smartvoter.org/2003/11/04/ca/mrn/city.html.

[4] *See* http://www.ci.santee.ca.us/dhr/AnnualFundingPlan03.pdf.

[5] *See* http://www.sanjoseca.gov/planning/Census/Citywide_dp_pdf/housing_char_2000-4.pdf.

units analyzed (252,276).[6] But in San Rafael, the seat of affluent Marin County, renter-occupied units analyzed in the 2000 census represented an astounding 51% of all housing units (20,143) so studied.[7] Thus, tenants as a political constituency add considerable weight to the constituency of mobilehome owners and their subtenants.

The same political forces that account for mobilehome rent control in the first place also invest its administration with prosecutorial zeal against park owners. Rent control board members are, after all, appointed by the same local political forces that enacted rent control. Such board members do not bite the hands that appoint them. On the contrary, they are likely to covet higher office themselves, and therefore pursue aggressive rent control policies to curry additional favor with the political forces that landed them on the rent board.

Indeed, in a number of jurisdictions the local administrations and town counsel have joined forces with associations of mobilehome owners in litigation and political campaigns against the park owner. ELS (formerly known as Manufactured Home Communities, Inc.) has experienced this phenomenon in recent years in San Rafael, Santee, San Luis Obispo, Santa Cruz and San Jose.

One power wielded by these same political forces has particular significance in appraising the Ninth Circuit's ruling below on issue preclusion. Local officials appoint supposedly neutral hearing officers who decide rent

[6] *See* http://www.sanjoseca.gov/planning/Census/Citywide_dp_pdf/housing_char_2000-4.pdf.

[7] *See* http://www.bayareacensus.ca.gov/cities/SanRafael.pdf.

control cases at the administrative level.[8] But in fact, the financial incentive of such hearing officers is to decide their cases to please those holding the power of appointment. Aside from skewing individualized rent adjustment disputes, this structural economic bias has even greater force when a park owner dares attack the rent control ordinance itself, facially or as applied, under the Fifth Amendment or other constitutional authority. The "neutral" hearing officer's economic incentive to make findings in favor of the ordinance is overwhelming.

This Court has long held that an economic bias of that kind destroys the impartiality that Due Process requires of governmental decision-makers. *Ward*, 409 U.S. at 57; *Tumey v. Ohio*, 273 U.S. 510 (1927). Indeed, the California Supreme Court recently applied those precedents in holding that "[c]ounties that appoint temporary administrative hearing officers must do so in a way that does not create the risk that favorable decisions will be rewarded with future remunerative work." *Haas v. County of San Bernardino*, 45 P.3d 280, 283 (Cal. 2002). Unfortunately, mobilehome rent control jurisdictions continue to operate as they always have. And even if they were forced to comply with *Haas*, the underlying structural bias against park owners would find other ways to express itself.

This Court has also held in *Ward* and *England* that the opportunity for local judicial review, and certiorari or appellate review here, is neither a substitute nor a cure for

[8] *E.g.*, Title 20, San Rafael Municipal Code (Mobilehome Rent Stabilization), § 20.12.060 (city manager appoints rent dispute "arbitrator"); Title 17, Chapter 17.22, San Jose Municipal Code (Mobilehome Rent Ordinance), § 17.22.050 (administrative hearing officer appointed by city council or city manager).

a biased forum at the fact-finding stage. *Ward* held that the "procedural safeguard" of local judicial review

> does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

Ward, 409 U.S. at 61-62. Similarly, *England* held that "[l]imiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings." *England*, 375 U.S. at 416.

In addition, *Patsy's* special warning about biased administrative regimes adds considerable weight to *Ward* and *England*. California's courts, like most, offer only a deferential review of many key administrative rulings. In one case involving *amicus* ELS, for example, then known as Manufactured Home Communities, Inc. ("MHC"), an administrative hearing officer in San Jose not only made factual findings adverse to MHC in a test-case rent adjustment dispute but also interpreted the newly adopted ordinance amendment adversely to MHC. Nevertheless, the state appellate court held that deference was due to both types of ruling at the trial court level. And on appeal, the court offered only a substantial evidence review of the factual findings, and deferred to the legal ruling, too, on the grounds of the hearing officer's presumed expertise and experience (despite her presumptive bias). *MHC*

Operating Limited Partnership v. City of San Jose, 130 Cal. Rptr. 2d 564, 573-75 (Ct. App. 2003).[9]

Aggravating this situation are two doctrines established by case law in California. First, the California Supreme Court held in *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851 (Cal. 1997), that the sole remedy in many rent control taking cases is a trip back to the same biased administrative regime that committed the constitutional violation in the first place. *Kavanau* held that the sole remedy for an unconstitutionally suppressed rent is not a monetary award against the responsible public entity, but rather a discretionary "consideration" of the past constitutional violation when the administrative body meets to establish future rents. As Justice Brown aptly protested in the present case, "the lamb [has been] committed to the custody of the wolf." *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 120 (Cal. 2002) (Brown, J., dissenting) (*quoting* The Works of John Adams).

Second, California's appellate courts have openly announced their rejection of the Ninth Circuit's consistent holding (footnote 2, *supra*) that rent control laws do not substantially advance their avowed purpose of securing

[9] *Hensler v. City of Glendale*, 876 P.2d 1043, 1052-53 (Cal. 1994), appears to require *de novo* trial court review of all administrative decisions on takings claims, but more recent California cases raise doubt about the scope of *Hensler*'s application. One appellate court, for example, appeared to hold that deferential (substantial evidence) review applies to any decision of a mobilehome rent control board against a park owner on the grounds that it is not asserting a "fundamental vested right." *MHC Operating Limited Partnership*, 130 Cal. Rptr. 2d at 573-75. However, no takings claim had been asserted in that case.

affordable housing if the reduced rents they impose are offset by higher capital costs. *E.g.*, *Montclair Parkowners Ass'n v. City of Montclair*, 90 Cal. Rptr. 2d 598, 603-06 (Ct. App. 1999) ("We are not persuaded.")

For the foregoing reasons, ELS urges this Court to reject the Ninth Circuit's holding below to avoid not only error, but also unique and intolerable prejudice to owners of rent controlled mobilehome parks in California.

III. CALIFORNIA'S IMPOSITION OF RENT CONTROL ON MOBILEHOME PARKS DEMONSTRATES THAT THE NINTH CIRCUIT'S HOLDING WOULD FORECLOSE VALID TAKINGS CLAIMS FROM BEING LITIGATED ON THEIR MERITS IN FEDERAL COURT

This case demonstrates only one of the problems that *Williamson County* has created: after twelve years of litigation, including three published appellate decisions, petitioners' federal takings claim remains unresolved on its merits. *Amici* submit this brief, in part, to demonstrate to the Court that California's unique imposition of rent control on mobilehome parks raises serious constitutional questions and that the Ninth Circuit's decision in this case, if permitted to stand, may well prevent valid constitutional claims from ever being litigated on their merits in federal court.

In *Lingle v. Chevron USA, Inc.*, docket No. 04-163, pending before the Court this term, *amici* and a group of economists submitted an *amici curiae* brief to this Court explaining the economic and practical consequences of California's imposition of rent control on mobilehome parks. The arguments in that brief will not be repeated,

but as set forth therein, California's system of rent control for mobilehome parks does not advance any legitimate state purpose. Instead, it constitutes a one-time transfer of wealth from mobilehome park owners to tenants and, as such, is unconstitutional under the "substantially advances" standard this Court has applied in regulatory takings cases for a quarter of a century.

California's imposition of rent control was before this Court in *Yee*. This Court held that the rent control did not constitute a *physical* taking, but declined to address whether it constituted a *regulatory* taking (*i.e.*, whether or not it substantially advances a legitimate state purpose) because the issue was not properly before the Court. Following *Yee*, the issue has been fully litigated in the lower courts and the Ninth Circuit has recognized that when a regulation may give rise to a "premium," the regulation is unconstitutional. *See* footnote 2, *supra*. Applying these principles to California's imposition of rent control on mobilehome park owners, the Ninth Circuit recently held that one such ordinance was unconstitutional because it failed to contain a mechanism to prevent the transfer of a "premium" and, thus, could not substantially advance a legitimate state interest. *Cashman*, 374 F.3d at 896-99. Such a rent control ordinance is unconstitutional unless the governmental entity can prove that externalities prevent the creation of a "premium." *Id.*

As demonstrated in *amici's* brief in *Lingle*, statistical studies have demonstrated that rent control of mobilehome parks creates a "premium." Accordingly, California's imposition of rent control clearly raises serious and significant constitutional issues. Yet, the Ninth Circuit's decision in this case, if permitted to stand will foreclose

many of these claims from being litigated on their merits by an Article III court. Moreover, *Williamson County* has created a system in which state and local governmental entities seek to force federal takings claims into state court, both as a function of forum-shopping[10] and to cause delay to financially "wear out" all but the most financially solvent and determined property owners. This problem is even more pronounced in California, because California state courts have consistently refused to apply appropriate heightened standards to review regulatory takings and have rejected the "premium" based theories recognized by this Court in *Yee* and adopted by the Ninth Circuit. *See* footnote 2, *supra*.

Therefore, *amici* urge this Court not only to reverse the Ninth Circuit's decision in this case, but to use this case to limit or overrule *Williamson County*, as set forth in Section IV, so that legitimate constitutional claims can be adjudicated on their merits in federal court.

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[10] Consider the Cashmans, who recently prevailed before the Ninth Circuit. *Cashman*, 374 F.3d at 896-99. Even though they were permitted to bring a facial challenge, which is not subject to *Williamson County's* exhaustion requirement, *Yee*, 503 U.S. at 533-34, shortly *after* the Cashmans filed suit in federal court, the City of Cotati filed a declaratory relief action in state court, seeking a declaration as to the constitutionality of the rent control ordinance. Why did the City of Cotati file this duplicative action? The City of Cotati conceded that its purpose was to "gain a more favorable forum in which to litigate the constitutionality of its mobilehome park rent stabilization ordinance" (based on the state authorities cited in footnote 2) and to "seek to persuade the federal [district] court to abstain" from hearing the Cashman's case. *City of Cotati v. Cashman*, 52 P.3d 695, 698 (Cal. 2002). The state trial court imposed sanctions on the City of Cotati for chilling the Cashman's constitutional rights and ordered the case dismissed under California's Anti-SLAPP statute. Cal. Code Civ. Proc. § 425.16. The California Court of Appeal and the California Supreme Court set those sanctions aside.

IV. *WILLIAMSON COUNTY* SHOULD BE HELD INAPPLICABLE TO "AS APPLIED" REGULATORY TAKINGS CLAIMS WHERE "JUST COMPENSATION" IS IRRELEVANT

As demonstrated by this case, and by the *amicus* briefs submitted in support of the certiorari petition, *Williamson County* is in need of repair. *Williamson County* allowed the federal claim to be preserved while state law issues were resolved. Reversing the Ninth Circuit's decision in this case will make it clear that after a property owner has exhausted state remedies, as required by *Williamson County*, the owner has a right to have a federal court pass on the merits of their constitutional claim, unimpeded by the state court proceedings.

In considering mechanisms to address the problems created by *Williamson County*, this Court should clarify that *Williamson County's* exhaustion requirement does not apply to "as applied" regulatory takings claims challenging whether a statute or ordinance substantially advances a legitimate state interest.

Under current law, property owners wishing to assert a takings claim are placed in an unfair bind. *Williamson County's* exhaustion requirements appropriately do not apply to a facial claim which challenges the constitutionality of a regulation "on its face." *Yee*, 503 U.S. at 534. Yet the Ninth Circuit has held that facial claims are subject to a statute of limitations defense and are time-barred unless brought within two years of the enactment of the challenged regulation. *See Hacienda*, 353 F.3d at 655; *Levald, Inc. v. City of Palm Desert*, 998 F.3d 680, 688 (9th Cir. 1993).[11] Therefore, unless the property owner happened to own the property in question at the time the statute was enacted, or acquired it shortly thereafter, it cannot bring a "facial" claim and must bring an "as applied" claim, which lower courts have held are subject to *Williamson County's* exhaustion requirement. *See, e.g., Hacienda*, 353 F.3d at 655 (noting that a takings claim is time-barred, if brought as a "facial" claim, or unripe, if brought as an "as applied" claim).

However, the exhaustion requirements of *Williamson County* are equally inapplicable to Fifth Amendment claims in the "as applied" context. Such claims are borne out of the same failure of the regulation to advance any public purpose and cannot be cured by "Just Compensation." Accordingly, claimants bringing such "as applied" claims do not seek "Just Compensation" under the Fifth Amendment; instead they seek injunctive relief, a determination the regulation is unconstitutional and ordinary damages for the losses caused by the imposition of the regulation.

Much of the confusion comes from the following statement in *Williamson County*, which has been misconstrued by lower courts:

> The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.

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[11] Permitting the statute of limitations to be applied in this matter runs afoul of *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-27 (2001), wherein this Court held that a state should not be able to "put an expiration date on the Takings Clause." *See Hacienda*, 353 F.3d at 656 n.5 (declining to decide whether, in light of *Palazzolo*, the statute of limitations remains a valid defense to "facial" takings claims).

Williamson County, 473 U.S. at 194. This statement is both overbroad, because it suggests that "Just Compensation" is relevant to *all* takings inquiries, and under inclusive because it fails to take into account that a valid taking *also* requires that a legitimate public purpose be advanced.

The Takings Clause of the Fifth Amendment reads: "nor shall private property be taken for public use, without just compensation." Thus, the text of the Takings Clause "imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Foundation*, 538 U.S. 216, 231-32 (2003). Accordingly, whenever the government takes private property, it must be for a "public use" and, *if* for a "public use," then "just compensation" must be paid. *Id.* at 233. Conversely, a governmental entity can never take private property for a private, not public, purpose regardless of the amount of "just compensation" paid. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984).

If a statute or ordinance does not substantially advance a legitimate state purpose, then the Public Use clause has been violated and the governmental entity did not have the authority to pass the regulation in the first instance. In that case, no amount of "Just Compensation" can make the constitutional violation go away and exhaustion under *Williamson County* serves no purpose. Thus, "Just Compensation" is irrelevant to these claims and the remedy is an injunction against future enforcement of the unlawful regulation and ordinary damages for losses incurred. As Justice O'Connor wrote in *Midkiff*:

> [A] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and *would thus be void*. (Emphasis added).

Midkiff, 467 U.S. at 245. "Rather, the proper remedy for an invalid exercise of the police power is amendment or withdrawal of the regulation and, if authorized and appropriate, damages." *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 473 n.4 (9th Cir. 1994). Similarly, Professor Tribe has written:

> However, if a [takings] challenge is to the complete absence of any public purpose, that challenge is ripe without resolution of any "just compensation" issue.

1 Laurence H. Tribe, *American Constitutional Law* § 3-10 n.26 (3d ed. 2000).

In *Yee*, this Court held that *Williamson County* exhaustion is not required for facial takings claims because facial claims do not "depend on the extent to which petitioners are deprived of the economic use of their particular property or the extent to which these particular petitioners are compensated." *Yee*, 503 U.S. at 534. The same is true in the "as applied" context when a regulation fails to substantially advance a legitimate state purpose: the governmental entity lacked the authority to pass the regulation in the first instance and the amount of compensation is irrelevant. Thus, the distinction between "facial" and "as applied" claims has no place in this type of regulatory takings claim because, as noted above, the remedy for a failure to substantially advance a legitimate purpose claim is not "Just Compensation," but, rather, monetary damages and withdrawal of the offending regulation. This

is true whether the law fails to substantially advance a government purpose "as applied" or on its face; in either event, the governmental agency lacked the authority to pass the regulation in the first instance and it is void. *Midkiff*, 467 U.S. at 245.

The inappropriateness of *Williamson County's* exhaustion requirements in these type of regulatory takings claims is even more compelling in states such as California, where state procedures provide *no* remedy. In the context of rent control, if the regulation does not substantially advance a legitimate state purpose, as discussed above, the regulation is void. In that case, the property owner is permitted to charge market rents. Yet, under California law, there is simply no ability to obtain market rent or any damages for past constitutional violations. Instead, the sole remedy is a discretionary adjustment of *future* rents. *Kavanau*, 941 P.2d at 865-66. This requires property owners to go through years of administrative and judicial proceedings just to obtain modest rent increases. *See, e.g., Galland*, 16 P.3d at 136-43 (describing 13 years of administrative and judicial proceedings in order to obtain $5 and $25 rent increases). But adjusting future rents, in a regulated environment, does not right the constitutional wrong. As the Ninth Circuit correctly noted in *Cashman*:

> However, . . . an incumbent tenant selling his/her mobilehome can nonetheless extract a premium above and beyond any such rental increase based on the security of living in a mobilehome park where future rental increases are limited by the government.

Cashman, 374 F.3d at 895. In other words, only when the marketplace is allowed to operate with respect to both aspects of housing costs (rent and home prices) will the

premium be eradicated. Nonetheless, the Ninth Circuit seemingly agrees that California's procedures provide an adequate remedy under *Williamson County*, despite only a theoretical chance the property owner may obtain any relief. *See, e.g., Hacienda*, 353 F.3d at 659-60 (requiring exhaustion of state remedies even though "we are left with uncertainty as to the efficacy of" state procedures). Furthermore, as noted above, footnote 2, *supra*, California applies the incorrect legal standard, thereby making exhaustion all the more futile.

In *Williamson County*, this Court held that the claim at issue arose under the "Just Compensation Clause." 473 U.S. at 186. As demonstrated above, the "Just Compensation Clause" is irrelevant in determining whether a land use regulation substantially advances a legitimate state interest. Compensation cannot cure the constitutional deficiency of a regulation's failure to advance a legitimate state purpose. Accordingly, this Court should clarify that *Williamson County* exhaustion is not required in order to pursue an "as applied" regulatory takings claim based on a failure to substantially advance theory. *Cashman*, 374 F.3d at 892 n.6 ("we hold that the denial of compensation is irrelevant for ripeness purposes where a takings claim is based on the theory that the ordinance does not substantially advance a legitimate state interest").

Alternatively, *Williamson County* should simply be overruled. Property owners are the only group required to exhaust state remedies prior to bringing a Section 1983 claim and it is hard to rationalize why private property owners should be so singled out.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision should be reversed and *Williamson County* should be clarified as inapplicable to "as applied" takings claims challenging whether a statute or ordinance substantially advances a legitimate state interest.

Dated: January 24, 2005

Respectfully submitted,

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NO. 04-340

In The Supreme Court Of The United States

SAN REMO HOTEL L.P., et al.,
Petitioners,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF *AMICUS CURIAE* FRANKLIN P. KOTTSCHADE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

		Page
INTEREST OF AMICUS CURIAE		1
SUMMARY OF ARGUMENT		3
I	*WILLIAMSON COUNTY* CONTAINED A FATAL FLAW: IT WRONGLY ASSUMED THAT A 5TH AMENDMENT TAKING WITHOUT JUST COMPENSATION IS NOT COMPLETE UNTIL A STATE COURT ADJUDICATES THAT THE LOCAL AGENCY REALLY WILL NOT PAY	4
II	THE MORE RECENT DECISION IN *CITY OF CHICAGO*, RENDERED A DOZEN YEARS AFTER *WILLIAMSON COUNTY*, HAD TO HAVE A SUBSTANTIVE IMPACT ON THE "RIPENESS" PROCEDURE IN TAKINGS CASES	13

TABLE OF CONTENTS
(continued)

Page

III IF *WILLIAMSON COUNTY* CORRECTLY APPLIED THE 5TH AMENDMENT TO REQUIRE STATE COURT LITIGATION IN ORDER TO "RIPEN" FEDERAL COURT LITIGATION, THEN LOWER COURTS HAVE MISAPPLIED PRECLUSION DOCTRINES TO PREVENT THE RIPENED FEDERAL COURT LITIGATION 16

A The Premise of *Williamson County* Was That Property Owners Would Be Able To Obtain A Federal Court Ruling On The Merits Of Their Regulatory Taking Claims After They First "Ripened" Their Cases In State Court 16

B Lower Courts Have Misused Williamson County As A Device To Prevent Property Owners — Alone Among Citizens — From Litigating Federal Constitutional Issues In Federal Court 20

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Barbian v. Panagis, 694 F.2d 476 (7th Cir. 1982) 17

Bell v. Hood, 327 U.S. 678 (1946) 10, 20

Brown v. Board of Education, 347 U.S. 483 (1954) 8

Chicago B.& Q.R. Co. v. Chicago, 166 U.S. 226 (1897) 4

City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997) 2, 3, 13, 14, 15, 28

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 12

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 23

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 15

Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 15

Cooper v. Aaron, 358 U.S. 1 (1958) 8

DLX, Inc. v. Commonwealth of Kentucky, 381 F.3d 511 (6th Cir. 2004) 21, 25

Dodd v. Hood River County, 136 F.3d 1219 (9th Cir. 1998) 24

Dolan v. City of Tigard, 512 U.S. 374 (1994)] 23

Page

England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964) 19, 20, 25

Estes v. Texas, 381 U.S. 532 (1965) 8

Felder v. Casey, 487 U.S. 131 (1988) 7, 11, 21

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 7, 8

Fountain v. Metro Atlanta Rapid Trans. Auth., 678 F.2d 1038 (11th Cir. 1982) 17

Funk v. U.S., 290 U.S. 371 (1933) 15

Kottschade v. City of Rochester, 319 F.3d 1038 (8th Cir. 2003), cert. denied, No. 02-1848 (10/6/03) 1

Larkin v. Grendel's Den, 459 U.S. 116 (1982) 23

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 7

Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141 (9th Cir. 1983) 17

McDaniel v. Sanchez, 452 U.S. 130 (1981) 16

Mitchum v. Foster, 407 U.S. 225 (1972) 21

Monell v. Dept. of Social Services, 436 U.S. 658 (1978) 6

Page

Monroe v. Pape, 365 U.S. 167 (1961) 11, 23

Nemmers v. City of Dubuque, 764 F.2d 502 (8th Cir. 1985) 17

Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003) 5

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 21

Peduto v. City of North Wildwood, 878 F.2d 725 (3d Cir. 1989) 24

Preseault v. I.C.C., 494 U.S. 1 (1990) 10, 19

Rainey Brothers Constr. Co., Inc. v. Memphis & Shelby County Bd. of Adjustment, 967 F. Supp. 998 (W.D. Tenn. 1997), aff'd 178 F.3d 1295 (6th Cir. 1999) (table) (unpublished 6th Circuit opinion at 1999 U.S. App. LEXIS 6396) 24

Screws v. U.S., 325 U.S. 91 (1945) 11

SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967) 15

Suitum v. Tahoe Reg. Plan. Agency, 520 U.S. 725 (1997) 26

U.S. v. General Motors Corp., 323 U.S. 373 (1945) 6

Wainwright v. Sykes, 433 U.S. 72 (1977) 11

Wilkinson v. Pitkin County Bd. of Comm'rs, 142 F.3d 1319 (10th Cir. 1998) 24

Page

Will v. Michigan Dept. of Police,
491 U.S. 58 (1989) 5

Willcox v. Consolidated Gas Co.,
212 U.S. 19 (1909) 20

Williamson County Reg. Plan. Comm'n v.
Hamilton Bank, 437 U.S. 172 (1985) 1, 2, 3, 4,
..... 5, 6, 7, 10, 11, 12, 13, 14, 15,
..... 16, 17, 18, 19, 20, 21, 23,24,
..... 25, 26, 27, 28, 29

Wilson v. Garcia,
471 U.S. 261 (1985) 8

CONSTITUTION

U.S. Constitution 1st Amendment 23

U.S. Constitution 5th Amendment 3, 4, 5, 6, 8, 9, 12, 15, 16,
..... 22, 23, 24, 26, 27, 28

U.S. Constitution 11th Amendment 5

U.S. Constitution 14th Amendment 6, 23

STATUTES

28 U.S.C. § 1441(a) 3, 13, 14, 22

28 U.S.C. § 2254(b) 11

42 U.S.C. § 1983 ..... 5, 6, 21

42 U.S.C. § 4651(1) 9

42 U.S.C. § 4651(8) 9

42 U.S.C. § 4655 9

Page

522 U.S. at 175 14

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TABLE OF AUTHORITIES
(continued)

Page

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BRIEF OF FRANKLIN P. KOTTSCHADE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

With the joint written consent of the parties filed with the Clerk of the Court, Franklin P. Kottschade respectfully submits this brief as *amicus curiae*.[1]

INTEREST OF AMICUS CURIAE

Franklin P. Kottschade is a realtor and real estate developer from Rochester, Minnesota. He has been an active leader in associations of realtors and home builders at the national, state, and local level for many years, and an active participant in charitable and community projects.

Mr. Kottschade's interest in this case stems from his own personal experiences in a similar case recently. (*Kottschade v. City of Rochester*, 319 F.3d 1038 [8th Cir. 2003], *cert. denied*, No. 02-1848 [10/6/03].)

Mr. Kottschade filed his suit directly in U.S. District Court, without attempting to "ripen" his case in state court, as described in *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 437 U.S. 172 (1985). As Mr. Kottschade explained, there was an extreme danger that taking the case first to state court would ultimately deprive him of any opportunity to have his

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[1] Counsel for *amicus curiae* authored this brief in whole and no other person or entity other than *amicus* or his counsel has made a monetary contribution to the preparation or submission of this brief.

federal constitutional issues heard in federal court. The 8th Circuit agreed that this concern was "justly" held. (319 F.3d at 1041.)

The decision below bears out that concern. Here, once the property owners had gone to state court — under the compulsion of *Williamson County* — and litigated *only* state law issues there, the 9th Circuit held that they were *legally precluded* from pursuing *any federal* claims in federal court. (Pet. App. 4a)

Mr. Kottschade appears here as the proverbial "Exhibit A" to the adage, "you can't get here from there." The San Remo Hotel tried its case in state court and was thereafter prevented from litigating in federal court on the ground that the state court litigation was the "equivalent" of seeking the protection of the federal courts. (Pet. App. 4a) Mr. Kottschade's fear expressed to the 8th Circuit proved unfortunately prophetic.

Moreover, this Court's more recent decision in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), allowing removal of such "ripening" cases from state to federal courts by defendant municipalities, had to have affected the *Williamson County* requirement. Acknowledging that the presence of both precedents exposed an "anomalous . . . gap in Supreme Court jurisprudence" (319 F.3d at 1041), the 8th Circuit said only this Court could bridge that gap in Mr. Kottschade's — or anyone else's — case.

Mr. Kottschade brings to this argument his experience in trying to litigate federal constitutional claims in federal court. He is a living, breathing

example of what is wrong with *Williamson County* as it operates in reality.

SUMMARY OF ARGUMENT

1. It is time for the Court to reconsider the requirement of state court litigation laid down in *Williamson County*. The underlying premise of that case goes beyond the plain language and meaning of the 5th Amendment. A city's taking of private property without just compensation is complete when property is taken and compensation is not paid *by the city*. It does not require a judicial determination to complete, or ripen, the taking. And, if it did, there is no reason why such a determination must take place in state court.

The Court's more recent decision in *City of Chicago*, authorizing a municipal defendant to remove a state court takings proceeding immediately to federal court, emphasizes the flaw in *Williamson County*. As removal is proper *only* if the plaintiff could have brought suit in federal court in the first place (28 U.S.C. § 1441[a]) — something *Williamson County* forbids — the two precedents dealing with state court 5th Amendment litigation cannot consistently co-exist.

2. If the Court decides to maintain *Williamson County*'s rule that state litigation is necessary to "ripen" a 5th Amendment takings claim for federal court litigation, then lower courts need to be instructed that general doctrines of preclusion (e.g., res judicata, collateral estoppel, *Rooker-Feldman*) do not apply.

Unlike other kinds of litigation, takings claimants have been told that state court litigation is required before federal court litigation is ripe. Thus, it cannot be that plaintiffs who do precisely as this Court instructed and ripen their claims by litigating in state court can then be told — as San Remo Hotel was at bench — that the state litigation was the "equivalent" of federal litigation and their efforts to ripen a 5th Amendment claim automatically precluded ever bringing a 5th Amendment claim.

I

WILLIAMSON COUNTY CONTAINED A FATAL FLAW: IT WRONGLY ASSUMED THAT A 5TH AMENDMENT TAKING WITHOUT JUST COMPENSATION IS NOT COMPLETE UNTIL A STATE COURT ADJUDICATES THAT THE LOCAL AGENCY REALLY WILL NOT PAY.

The 5th Amendment's Just Compensation Clause (the first element of the Bill of Rights incorporated into the 14th Amendment's Due Process Clause)[2] prohibits government from taking private property for public use unless it pays just compensation. A violation of that provision occurs as soon as government action takes private property and the municipality fails or refuses to pay. There is nothing in either logic or the language of the 5th Amendment to require state court certification of non-payment before the taking is complete.

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[2] *Chicago B.& Q.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

That is *Williamson County*'s flaw: it held that the taking was not complete until compensation was denied not just by the taking entity, but also by the state courts.

Williamson County quite properly began its analysis with the words of the 5th Amendment, noting that the constitutional provision "does not proscribe the taking of property; it proscribes taking without just compensation." (473 U.S. at 194.) The problem arises because the Court then blurred the distinction between acts of the agency that actually committed the taking and the State that may or may not have provided compensation through litigation. (473 U.S. at 195-196.)

But the *state* is not involved in 42 U.S.C. § 1983 cases like this one. States and their officials cannot be sued under Section 1983 (*Will v. Michigan Dept. of Police*, 491 U.S. 58 [1989]), nor (with very narrow exceptions [*Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003)]) can they be brought into federal court at all against their will (U.S. Const., 11th Amendment). The real issue in cases like this is whether the local entity — like the City and County of San Francisco at bench — is alleged to have taken private property for public use and failed to pay for it. If so, the question whether the city can be *compelled* to pay lies at the heart of litigation in either state or federal court.

The crux of the problem with *Williamson County* is that it *merged the state legal system with the local agency defendant* and disregarded the plain words of the Constitution. Nothing in the 5th Amendment requires multiple litigation or state court deference. It does not

say ". . . nor shall private property be taken for public use without just compensation *as finally determined by suing the municipal defendant in state court.*"[3]

The issue is not whether a state has countenanced the constitutional violation, but whether the municipal defendant has committed it. 42 U.S.C. § 1983 forbids any person, including municipalities (*Monell v. Dept. of Social Services*, 436 U.S. 658, 690 [1978]), acting under color of state law from violating rights secured by federal law. The gravamen of a 5th Amendment claim is a taking of property[4] and nonpayment by the taker. When a city council — like San Francisco's — conscripts private property into public service without any pretext of compensation, it violates the 5th Amendment. The presence or absence of a state remedy has no bearing on whether the malefactor did the deed.

A year after *Williamson County*, the Court seemed to understand this, explaining *Williamson County* as being based on the premise that "a court

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[3] Indeed, when adopted, the 5th Amendment applied only to the federal government The 14th Amendment applied its precepts to the states, but there have been no developments in constitutional law suggesting that this provision has been *de facto* amended to exclude the federal courts from enforcing it.

[4] As explained in *U.S. v. General Motors Corp.*, 323 U.S. 373, 378 (1945), it is the deprivation of the owner, not the accretion of any interest to the taker, that constitutes the compensable taking.

cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation *the responsible administrative body intends to provide*." (*MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 [1986]; citation omitted; emphasis added.) At another point, the same opinion talks of determining "if *proffered* compensation is 'just.'" (477 U.S. at 350; emphasis added.) Neither formulation requires state court litigation. If needed, a simple inquiry can answer questions of "intent" and "proffer."

After saying that in *MacDonald*, the Court again explained *Williamson County* as holding that "an illegitimate taking might not occur *until the government refuses to pay*" (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 320, fn. 10 [1987]; emphasis added), without any reference to whether a state court had refused to *order* payment. In any event, if a city refuses to provide compensation as required by the U.S. Constitution and recourse to the courts must be had, there is no reason why such recourse should — let alone must — be had only in *state* courts when the *federal* constitution is being violated.

Deferring to state courts is tantamount to granting states a veto over access to federal court, making them *de facto* federal court gatekeepers. The Court has repeatedly concluded that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." (*Felder v. Casey*, 487 U.S. 131, 144 [1988],

quoting *Wilson v. Garcia*, 471 U.S. 261, 269 [1985].)[5]

Mandating suit in state court imports into the 5th Amendment a remedial requirement when the just compensation language is a limitation on government's inherent power, not an invitation to sue for payment,[6] and where the Just Compensation Clause is self-executing. (*First English*, 482 U.S. at 315.)

If nothing else, any required suit for payment is contrary to Congressional policy established in 1970 in

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[5] Granting states such a position leads to a *sub rosa* resuscitation of the discredited "interposition doctrine" that reared its head briefly in the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954) (i.e., the southern strategy of "interposing" sovereign state law to ward off the effects of decisions like *Brown*), only to be interred a few years later. (See *Cooper v. Aaron*, 358 U.S. 1 [1958]; see also *Estes v. Texas*, 381 U.S. 532, 566 [1965], in which the trial judge proclaimed that his oath was to uphold the *state* constitution, rather then the *federal*. Needless to say, this Court corrected him.)

[6] See Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century Just Compensation Law*, 52 Vand. L. Rev. 57, 60-61 (1999); J. David Breemer, *Overcoming* Williamson County's *Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 219-225 (2003).

the Uniform Relocation Assistance and Real Property Acquisition Policies Act, which provides that the old days of grabbing property first and then saying "sue me" to the aggrieved owner are over. That Act makes it illegal for government agencies to make it necessary for property owners to sue for their just compensation.[7] Rather, the duty is the government's to acquire whatever property interests are needed for the public good, either by negotiation (42 U.S.C. § 4651[1]) or, failing that, condemnation (42 U.S.C. § 4651[8]).

In any event, if suit is required to demonstrate the actuality of a 5th Amendment violation, there is nothing in the 5th Amendment directing that the *only* place to seek that determination is in *state* court. As state and federal courts have concurrent jurisdiction to decide constitutional claims, the choice of forum, as in other

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[7] The Act provides succinctly, "No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property." (42 U.S.C. § 4651[8].) To make this a truly "uniform" law, as its title advertised, the policies in Section 4651 were made applicable to the states — by directing that federal funds could not be spent on state projects unless the state agreed to comply with these policies. (42 U.S.C. § 4655.) California, like other states, has complied. (Cal. Govt. Code § 7267.6 [making the standard applicable to all projects, not merely those with federal funding].)

cases, should belong in the first instance to the plaintiff.[8]

Nor are other constitutional rights treated that way.[9] Just as the Constitution forbids taking property, but only without just compensation, so the Constitution forbids the deprivation of life and liberty — but only if done without due process of law: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." And yet, plaintiffs complaining about deprivations of life or liberty without due process of law are not told they must first sue in state courts to determine whether relief can be had there, as a precondition to seeking redress in federal court. Quite the contrary. Their suits take place in federal court; the validity of the defendant's actions under state law, and the availability of state remedies is irrelevant. (See *Monroe v. Pape*, 365 U.S. 167 [1961] [police brutality case not required to be preceded by state tort suit for assault and battery]; *Felder v. Casey*, 487 U.S. 131, 148 [1988] [Section 1983 suits are enforceable in federal court "in the first instance"]; cf. *Screws v. U.S.*, 325 U.S. 91, 108 [1945].)[10]

If, as *Williamson County* said, the federal violation is not ripe until a *state court* verifies that state law provides no remedy, then *all* Section 1983 litigation would have to begin in state courts. In the words of the leading treatise, "If there is a reason why free speech cases are heard by federal judges with alacrity and property rights cases receive the treatment indicated above [i.e., diversion to state courts], it is not readily discernible from the Constitution." (Steven J. Eagle, Regulatory Takings 1070 [2d ed. 2001].)[11]

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[8] *Bell v. Hood*, 327 U.S. 678, 681 (1946): "a party who brings a suit is master to decide what law he will rely upon."

[9] *Williamson County*'s analogy to the Tucker Act's provisions for suing the United States for a taking (473 U.S. at 194), while superficially plausible, seems inapt. All that the Tucker Act cases say is that, before a property owner can sue to *invalidate* a federal law as a taking, the owner must first sue in a *federal* court for compensation under the *federal* Constitution. (E.g., *Preseault v. I.C.C.*, 494 U.S. 1 [1990].) That is all the San Remo Hotel and its owners (and others like them) want: the ability to sue the offending municipality immediately in a *federal* court for compensation for violating the *federal* Constitution.

[10] The lone exception is habeas corpus, where all issues (state and federal) must be raised in state court first. (28 U.S.C. § 2254[b].) However, once done, a habeas petitioner is not subjected to res judicata and full faith and credit barriers upon arriving in federal court. The issues may be argued afresh. (See, e.g, *Wainwright v. Sykes*, 433 U.S. 72, 80 [1977].)

[11] See also Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on Williamson County Regional Planning Board v. Hamilton Bank*, in Taking Sides on Takings Issues: Public and Private Perspectives, ch. 20 (ABA 2002; Thomas E. Roberts, ed.) (contrasting the treatment of land use cases with police brutality and parade permit cases).

There is no need to sue in State court merely to confirm the non-payment of just compensation. The non-payment is obvious; it is the reason for the suit. Had there been payment, there would be no litigation. This can be seen in any regulatory taking case. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), for example, the taking occurred in 1986, the case was furiously litigated, through two appeals to the 9th Circuit and one trip to this Court. That process consumed 13 years. At no time — even after a trial on the merits resulted in a compensatory judgment — did the city volunteer to pay anything. Suit was not necessary to determine the lack of compensation, or the city's lack of interest in paying.

Nor is a state suit needed to inform the defendant of the problem. Given the complexity of today's land use procedures — usually requiring years of effort and endless public hearings before action is taken — any agency that is not comatose is well aware by the end of the process that the property owner claims the city action violates the 5th Amendment. San Francisco was not in doubt about that claim. It simply chose not to honor it. Imposing on the San Remo Hotel (not to mention the time of the state courts) merely to confirm that obvious fact serves no legitimate purpose.

With respect, *Williamson County* erroneously construed the 5th Amendment to require a wasteful detour through state courts as a precursor to federal court litigation of a core federal constitutional issue. As shown below, lower court efforts to grapple with this rule, attempting to apply it while also giving deference

to general rules of preclusion, have created only chaos. It is time for this Court to acknowledge the original error and overrule the state court ripening requirement.

II

THE MORE RECENT DECISION IN *CITY OF CHICAGO*, RENDERED A DOZEN YEARS AFTER *WILLIAMSON COUNTY*, HAD TO HAVE A SUBSTANTIVE IMPACT ON THE "RIPENESS" PROCEDURE IN TAKINGS CASES.

In *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), the property owner did as instructed by *Williamson County*: it filed a state court action challenging the validity of land use regulations. The complaint raised due process, equal protection and takings claims. (See 522 U.S. at 160.)

The Court held that it was proper for the municipal defendant to remove the case to federal court under 28 U.S.C. § 1441(a). Section 1441(a) permits removal *if, but only if*, the plaintiff could have brought suit in federal court in the first place, but chose not to. The statute gives the defendant the even-handed ability to invoke federal jurisdiction as well.

It somehow got overlooked that, as a land use plaintiff, the International College of Surgeons could *not* have sued the City of Chicago in federal court; *Williamson County* precluded it. Nonetheless, the Court held removal was proper because "a case containing claims that local administrative action violates federal

law . . . is within the jurisdiction of federal district courts." (522 U.S. at 528-529.) The Court added that "the facial and as-applied federal constitutional claims raised by ICS 'arise under' federal law for purposes of federal question jurisdiction." (522 U.S. at 167-168.)

Justice Ginsberg's dissent emphasized *City of Chicago*'s momentous nature, characterizing the decision as both a "watershed" (522 U.S. at 175) and a "landmark" (522 U.S. at 180), because:

> "After today, litigants asserting federal-question or diversity jurisdiction may routinely lodge in federal courts direct appeals from the actions of all manner of local (county and municipal) agencies, boards, and commissions." (522 U.S. at 175; Ginsberg, J., dissenting.)

Believing that the *City of Chicago* decision had to impact *Williamson County*, Mr. Kottschade asked the 8th Circuit to reconcile them and allow suit to proceed in federal court. After all, if the City of Chicago could remove its litigation to federal court on the ground that it could have been initiated there, then Frank Kottschade ought to be able to file suit there directly under the fair reciprocity theory underlying 28 U.S.C. § 1441(a).

The 8th Circuit acknowledged what it called an "anomalous . . . gap in Supreme Court jurisprudence," but declined to address it, concluding that how to resolve the conflict "is for the Supreme Court to say, not us." (319 F.3d at 1041.)

City of Chicago demonstrates the error in *Williamson County*. Unburdened by being reminded of *Williamson County*,[12] the Court accurately and sensibly concluded that 5th Amendment cases are properly brought in federal court in the first instance.

Precedents are not cast away lightly. However, when scholars have been critical of its decisions,[13] when application of a precedent has produced a rule that "stands only as a trap for the unwary,"[14] when necessary to clarify the implications of earlier decisions,[15] when decisions of the Court are "if not directly . . . [conflicting,] are so in principle,"[16] or when "the answer suggested by [the Court's] prior opinions is not free of

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12 In fairness to the Court, the adversary system seems to have failed. Neither of the parties to *City of Chicago* cited *Williamson County*, and only one amicus brief even mentioned it (and that one only tangentially), so the Court was uninformed about the full consequences of its actions.

13 *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 48 (1977).

14 *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

15 *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967).

16 *Funk v. U.S.*, 290 U.S. 371, 374 (1933).

ambiguity,"[17] the Court has reviewed its earlier decisions and corrected its own errors. Each of those factors applies to *Williamson County*.

III

IF *WILLIAMSON COUNTY* CORRECTLY APPLIED THE 5TH AMENDMENT TO REQUIRE STATE COURT LITIGATION IN ORDER TO "RIPEN" FEDERAL COURT LITIGATION, THEN LOWER COURTS HAVE MISAPPLIED PRECLUSION DOCTRINES TO PREVENT THE RIPENED FEDERAL COURT LITIGATION.

If the Court decides that *Williamson County*'s state court requirement serves a constitutional purpose, then lower courts need to be told that the determination under state law cannot be used in conjunction with preclusion doctrines to prevent eventual federal court decision of the 5th Amendment taking issue.

A

The Premise of *Williamson County* Was That Property Owners Would Be Able To Obtain A Federal Court Ruling On The Merits Of Their Regulatory Taking Claims After They First "Ripened" Their Cases In State Court.

Even commentators opposed to landowners litigating regulatory taking cases in federal courts

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[17] *McDaniel v. Sanchez*, 452 U.S. 130, 136 (1981).

concede that the plain language of *Williamson County* contains a clear promise of federal court access:

> "Reliance [by the Court] on the ripeness rationale, unfortunately, suggests to property owners that their complaints will be ripe and heard in federal courts after their state suits are over." (Thomas Roberts, *Fifth Amendment Taking claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 Urb. Law. 479, 480 [1992].)

Williamson County made clear that the Court was creating a two-step procedure for regulatory taking cases. Its plain language shows that the Court was (a) deciding whether a claim was ***yet*** ripe for litigation in federal court and (b) that there were things which ***first*** had to be done in state court ***after which*** the federal constitutional claims ***would be ripe*** for federal court.

The Court's analytical discussion began by saying that ". . . respondent's claim is *premature*." (473 U.S. at 185; emphasis added.)[18] Prematurity necessarily means that something is yet to be done to make the matter

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[18] The Court did *not* say there was no valid claim. Nor could it. Federal courts at that time had dealt with such claims — as they routinely dealt with other Bill of Rights claims — for years. E.g., *Nemmers v. City of Dubuque*, 764 F.2d 502 (8th Cir. 1985); *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141 (9th Cir. 1983); *Barbian v. Panagis*, 694 F.2d 476 (7th Cir. 1982); *Fountain v. Metro Atlanta Rapid Trans. Auth.*, 678 F.2d 1038 (11th Cir. 1982).

mature, or jurisprudentially 'ripe." *Williamson County* then said that, because of failure to obtain a final administrative determination (not at issue here) and failure to sue under state law, ". . . respondent's claim is *not yet ripe*." (473 U.S. at 186; emphasis added.)

Throughout the opinion, the Court emphasized the temporal nature of its holding, repeatedly saying that such cases *can* be ripened and *then* litigated in federal court. The Court's language demonstrated that the Court plainly was *delaying* a property owner's entry into the federal courthouse, not barring it:

> "A second reason the taking claim is *not yet ripe* is that respondent did not seek compensation through the procedures the State has provided for doing so." (473 U.S. at 194; emphasis added.)
>
> "Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause *until* it has used the procedure and been denied just compensation." (473 U.S. at 195; emphasis added.)
>
> ". . . *until* [plaintiff] has utilized that procedure, its taking claim is *premature*." (473 U.S. at 197; emphasis added.)

The opinion ended as it began, with this conclusion:

> "[R]espondent's claim is *premature*, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment." (473 U.S. at 200; emphasis added.)

As noted above, *Williamson County* analogized to takings litigation involving federal statutes. (473 U.S. at 195.) To the extent that analogy has utility, it is this: before a plaintiff can sue in U.S. District Court for a declaration that a federal statute is invalid as an uncompensated taking of property, she must first sue in the Court of Federal Claims to seek compensation. If compensation is denied, litigation regarding invalidation becomes ripe. But the denial of compensation doesn't preclude the later suit, it ripens it. (See *Preseault v. I.C.C.*, 494 U.S. 1 [1990].)

So, here, once the state courts conclude as a matter of state law that compensation is not required, then federal litigation — on a clean slate — is timely.[19]

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[19] A clean slate is necessary, as the Court has recognized in the abstention context: "How the facts are found will often dictate the decision of federal claims. It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. . . . Thus, in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, *a litigant may not be unwillingly deprived of that determination . . . [nor of] his right to litigate his federal claims fully in the federal courts*." (*England*, 375 U.S. at 416-417; emphasis added.)

B

Lower Courts Have Misused *Williamson County* As A Device To Prevent Property Owners — Alone Among Citizens — From Litigating *Federal* Constitutional Issues In *Federal* Court.

Williamson County's evident establishment of a system by which property owners could eventually litigate federal issues in federal court was in keeping with a long line of decisions holding that those who plead federal claims and seek the aid of federal courts have a right to a federal determination. (E.g., *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 [1909]; *Bell v. Hood*, 327 U.S. 678, 681 [1946]; *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 [1964].) As the Court put it, there are "fundamental objections" to compelling a plaintiff who has legitimately invoked federal jurisdiction "without his consent and with no fault of his own, to accept instead a state court's determination of those claims." (*England*, 375 U.S. at 415.) And yet accepting California's determination — against their will — is precisely what the 9th Circuit compelled Petitioners to do here.

Williamson County was founded on the twin concepts of "not yet" and "not until." But lower courts have lost track of that. Instead, property owners — like San Remo Hotel — who satisfy *Williamson County* find, when attempting to file their now-ripened federal suits, that the door is barred by res judicata, collateral estoppel, or some other preclusion doctrine. Thus, the upshot is that this Court's endorsement of property

owners' right to litigate in federal court *after ripening their suits in state court* has been overruled by lower courts. Instead, takings plaintiffs have been banished to state courts.

If that had been this Court's intent, *Williamson County* could have said so. Directly. But it did not. Neither *Williamson County*, nor the Congress that enacted 42 U.S.C. § 1983 had that in mind. Quite the contrary.[20] In a recent decision, the 6th Circuit was unequivocal:

> "*Williamson County* . . . clearly contemplates that a takings plaintiff who loses her claim in state court will have a day in federal court." (*DLX, Inc. v. Commonwealth of Kentucky*, 381 F.3d 511, 518, fn. 3 [6th Cir. 2004] [refusing to apply *Rooker-Feldman* doctrine].)

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[20] The Court has been unequivocal that the goal of Section 1983 is "to provide compensatory relief to those deprived of their *federal* rights by state actors" (*Felder v. Casey* 487 U.S. 131, 141 [1988]; emphasis added) by "interpose[ing] the *federal courts* between the States and the people, as guardians of *the people's federal rights*." (*Mitchum v. Foster*, 407 U.S. 225, 243 [1972]; emphasis added.) To effectuate that goal, Congress intended to "throw open the doors of the United States courts" to those who alleged deprivation of constitutional rights "and to provide these individuals ***immediate*** *access to the federal courts* . . . ." (*Patsy v. Florida Board of Regents*, 457 U.S. 496, 504 [1982]; emphasis added.)

All commentators agree that the Court's words plainly tell property owners that the way to litigate their 5th Amendment claims in federal court is to "ripen" them by litigating first in state court, repairing thereafter to federal court.[21]

Other than property owners seeking constitutional redress, federal claimants are not required to "ripen" claims in state courts. (E.g., Robert H. Freilich, Adrienne H. Wyker & Leslie Eriksen Harris, *Federalism at the Millenium: A Review of U.S. Supreme Court Cases Affecting State and Local Government*, 31 Urb. Law. 683, 685 [1999].) "The state compensation portion of [*Williamson*] finds no parallel in the ripeness cases from other areas of the law." (Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 23 [1995].)

Indeed. Other Section 1983 litigation is not

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[21] E.g., Steven J. Eagle, Regulatory Takings 1063 (2d ed. 2001) ("The 'ripeness' metaphor is one that promises ultimate vindication"); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 67 (1995) ("the language . . . suggests that the state law suit is merely preparatory to a federal suit"); Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239 (2000) ("language . . . suggested that, eventually, a litigant's taking claim would be heard in federal court"); *Id.* at 249 ("language of Williamson suggests that a federal claim will survive after disposition in the state court").

subjected to any state court litigation requirement:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." (*Monroe v. Pape*, 365 U.S. 167, 183 [1961].)

But property owners with *5th Amendment* claims, and they alone, are denied the benefit of that rule.[22] The mechanism lower courts have used to thwart both the plain language and evident intent of *Williamson County* and federal claimants' right of access to federal court has been to combine *Williamson County*'s requirement of state court litigation with general doctrines of claim and issue preclusion.

Federal cases dismissing property owners' "ripened" efforts at federal court litigation abound. (In addition to the case at bench, see, e.g., *Dodd v. Hood*

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[22] Even property owners face no such ripeness hurdle if they raise *1st Amendment* claims. (See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 [1986]; *Larkin v. Grendel's Den*, 459 U.S. 116 [1982].) Only 5th Amendment claims receive this second-class treatment. (Compare *Dolan v. City of Tigard*, 512 U.S. 374, 392 [1994] ["We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation . . . ."].)

River County, 136 F.3d 1219 [9th Cir. 1998]; *Peduto v. City of North Wildwood*, 878 F.2d 725 [3d Cir. 1989]; *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319 [10th Cir. 1998]; *Rainey Brothers Constr. Co., Inc. v. Memphis & Shelby County Bd. of Adjustment*, 967 F. Supp. 998 [W.D. Tenn. 1997], *aff'd* 178 F.3d 1295 [6th Cir. 1999][table][unpublished 6th Circuit opinion at 1999 U.S. App. LEXIS 6396].)

Thus, according to these cases, "the very act of 'ripening' a case also ends it." (Robert H. Freilich, *The Public Interest Is Vindicated: City of Monterey v. Del Monte Dunes*, 31 Urb. Law. 371, 387 [1999].) In Prof. Roberts' colorful words:

> "Ironically, an unripe suit is barred at the moment it comes into existence. Like a tomato that suffers vine rot, it goes from green to mushy red overnight. It is never able to be eaten." (Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 72 [1995].)

As seems evident from the language of *Williamson County* and its underlying theory of "ripening" matters for federal court litigation, this Court intended no such thing. Rather, it preserved property owners' opportunity to litigate their 5th Amendment case in federal court. It is therefore apparent that the lower

courts are undermining the Court's intent.[23]

A recent decision agrees that the Court could not have designed this result:

> "The barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County*, and one which is unique to the takings context, as other § 1983 plaintiffs do not have the requirement of filing prior state-court actions; reading *Williamson County*, the expectation is that an unsuccessful state plaintiff will then return to federal court." (*DLX*, 381 F.3d at 520.)

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[23] The Court made it crystal clear in *England*, 375 U.S. at 416-417 that limiting a litigant to certiorari review from a state supreme court was not an acceptable substitute for full federal court litigation. (The decision below, holding the state court decision the "equivalent" of federal litigation [Pet. App. 4a] cannot be reconciled with the Court's view. See David L. Callies, *Regulatory Takings and the Supreme Court: How the Perspectives on Property Rights Have Changed From* Penn Central *to* Dolan, *and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523, 574 [1999] [lower courts are not hearing or not wanting to hear the Supreme Court].) Besides, state courts often dispose of cases on the basis of state law — as the California Supreme Court consciously did at bench (Pet. App. 107a, fn. 1, 170a, 194a) — so that seeking certiorari from such a decision may not even be possible.

The general preclusion doctrines being used to bar property owners from federal court were known to this Court when it decided *Williamson County*. They are the stuff of first year civil procedure. Just as plainly, *Williamson County* established a system that mandated dual court litigation: first in state court, to test the state compensation remedy and thereby "ripen" the case, followed by an action in federal court, to litigate the merits of the underlying 5th Amendment claims. That was an inefficient process, but at least it was rational.

But if the lower courts are correct, then the *Williamson County* "ripening" procedure was stillborn, and the Court wasted its time in formulating it. As the 10th Circuit put it, "It is difficult to reconcile the ripeness requirements of *Williamson* with the laws of res judicata and collateral estoppel." (*Wilkinson*, 146 F.3d at 1325, fn. 4.)

Mr. Kottschade believes it would be preferable to re-examine the underpinnings of *Williamson County* and overrule its state litigation requirement. As the American Planning Association once forthrightly told the Court, "[t]his Court should . . . eliminate the second prong of the ripeness doctrine that requires landowners to seek and be denied just compensation through available state procedures." (Amicus Curiae Brief of American Planning Association in *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725 [1997].)

However, if the inefficient, double litigation, ripening system is to be retained, then lower courts need to be instructed that the general doctrines of preclusion

do not apply in these cases. A special procedure has been created for regulatory taking cases that requires initial application to state courts, and the act of following that procedure cannot thereafter be used to prevent the ripened suit from being tried on its merits.

CONCLUSION

Williamson County's requirement of ripening 5th Amendment takings claims in state court is one of those ideas that probably sounded good at a theoretical level. As it has been applied during the past two decades, however, it has been a nightmare. It has caused needless anguish to property owners (some of whom, like Mr. Kottschade, are filing amicus curiae briefs here to share their experiences and concerns with the Court). It has caused wastefully duplicative litigation for state and federal court systems. And it has created a field day for criticism by lower courts and commentators.[24]

Citizens, lawyers, and — particularly — busy trial judges don't work at a theoretical level. Of necessity, they are concerned with nuts and bolts, rather than casuistically parsing words and theories and

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[24] A collection of colorful critiques like "absurd," "shocking," "draconian," "fraud," "hoax," and "Kafkaesque" (and many more) may be found in Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-parody Stage*, 36 Urban Lawyer 671, 702-703 (2004).

attempting to fit unfamiliar concepts (like the state court ripeness rule) into a matrix that already includes rules of claim and issue preclusion with which industrious trial judges work on a daily basis.

The idea that property owners with 5th Amendment claims — alone — should be precluded from asking federal courts to rule on their federal claims is anathema. It undercuts the Bill of Rights and minimizes the protections afforded American citizens. Indeed, the sum and substance of the lower court decisions applying variants of what they perceive to be the *Williamson County* rule is that property owners' 5th Amendment takings claims *cannot be heard in any court, state or federal.* Why? Because by the time they finish litigating their *state* constitutional taking claim in state court, that decision will have preclusive effect not only on a subsequent federal suit, but on any later attempt by the state court to adjudicate the 5th Amendment claim. Whatever that is, it is not law. It is a tragic-comic parody of law.

It is time to call a halt to the pointless, and plainly unintended, game playing to which property owners have been subjected. They have become the shuttlecocks of constitutional litigation, subject to dismissal under *Williamson County* if they deign to file in federal court, but also subject to removal under *City of Chicago* if they file in state court and their municipal opponents would prefer a federal forum. Constitutional rights deserve better.

Either *Williamson County*'s state court litigation requirement needs to be overruled, or lower courts need to be clearly told that the concept of "ripening" means just that: ripening. It cannot be a poison pill, nor can it convert state court litigation into the "equivalent" of federal court litigation if the Constitution is to have meaning.

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IN THE

Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T & R INVESTMENT CORP.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Full Faith and Credit Statute, 28 U.S.C. § 1738, bars federal takings claimants from relitigating in federal court legal issues decided adversely to them in state court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
THE LOWER FEDERAL COURTS PROPERLY APPLIED THE FULL FAITH AND CREDIT STATUTE, 28 U.S.C. § 1738, TO DISMISS PETITIONERS' TAKINGS CLAIMS	5
A. *Williamson County* Did Not Overrule The Full Faith And Credit Statute	6
B. Even If Federal Courts Were Authorized To Create Federal Common Law Regarding The Effect To Be Given State Court Judgments, Petitioners' Rule Would Be Ill-Advised	16
C. Petitioners' Claims Are Not Exempt From Preclusion Under Section 1738	21
D. The Court Should Disregard The Suggestion Of Petitioners' *Amici* To Overrule *Williamson County*	26
CONCLUSION	29

TABLE OF AUTHORITIES

Cases — Page

Agins v. City of Tiburon, 447 U.S. 255 (1980) ..13, 14, 15
Alabama DOT v. Land Energy, Ltd., 886 So.2d 787 (Ala. 2004) 18
Alexander v. Gardner-Denver, 415 U.S. 36 (1974) 11
Allen v. McCurry, 449 U.S. 90 (1980) ..... *passim*
Armstrong v. United States, 364 U.S. 40 (1960) ... 14
Breneric Associates v. City of Del Mar, 69 Cal. App.4th 166 (1998) 22
Chandler v. Roudebush, 425 U.S. 840 (1976) 10, 11
City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997) 28
City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687 (1999) 15, 17, 17-18
Corey v. Town of Merrimack, 666 A.2d 1359 (N.H. 1995) 18
Coscia v. McKenna & Cuneo, 25 P.3d 670 (Cal. 2001) 26
Davis v. Davis, 305 U.S. 32 (1938) 8
Dodd v. Oregon, 136 F.3d 1219 (9th Cir. 1998).... 5
Dolan v. City of Tigard, 512 U.S. 374 (1994) ..... *passim*
Dows v. City of Chicago, 78 U.S. (11 Wall.) 108 (1871) 28
Drake v. Town of Sanford, 643 A.2d 367 (Me. 1994) 18
Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996) 22
England v. Louisiana State Bd. of Medical Exam'rs, 375 U.S. 411 (1964) ..... *passim*
Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100 (1981) 27, 28
Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) 27

TABLE OF AUTHORITIES—Continued

Page

Hickerson v. City of New York, 146 F.3d 99 (2d Cir. 1998) 21
Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 19, 20, 28
Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851 (Cal. 1997) 19, 22
Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 15
Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) ..... *passim*
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 13, 14, 15
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 11
McElmoyle v. Cohen, 13 Pet. 312 (1839) 8
Migra v. Warren City School Dist., 465 U.S. 75 (1984) 21
Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813).... 8
Montana v. United States, 440 U.S. 147 (1979).... 12, 18
National Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 515 U.S. 582 (1995) 8, 27-28
Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 13, 14
Ohio Civ. Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) 8
Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 14, 15
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 15
Railroad Comm'n v. Pullman Co., Inc., 312 U.S. 496 (1941) 4, 5, 23, 26
San Remo Hotel, L.P. v. City of San Francisco, 83 Cal. App.4th 239 (2000) 12, 13, 20

TABLE OF AUTHORITIES—Continued

	Page
Santa Monica Beach, Ltd. v. Santa Monica Rent Control Bd., 968 P.2d 993 (Cal. 1999)	19, 22
Santini v. Connecticut Hazardous Waste Management Serv., 342 F.3d 118 (2d Cir. 2003)	7, 17, 25
Seawall Associates v. City of New York, 542 N.E.2d 1059	13
Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001)	17
Stolz v. Bank of America, 15 Cal. App.4th 217 (1993)	5, 26
Stone v. Powell, 428 U.S. 465 (1976)	9
Testa v. Katt, 330 U.S. 386 (1947)	19
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	28
Williamson County Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)	*passim*
Yee v. City of Escondido, 503 U.S. 519 (1992)	24, 27
Younger v. Harris, 401 U.S. 37 (1971)	8

Statutes and Constitutional Provisions

N.Y. Exec. Law § 295(6)	10
N.Y. Exec. Law § 296(1)(a)	10
28 U.S.C. § 1341	8
28 U.S.C. § 1738	*passim*
42 U.S.C. § 1983	8
42 U.S.C. §§ 2000e *et seq.*	9-10
42 U.S.C. § 2000e-5(c)	10
U.S. Const. art. VI, cl.2	15, 29

Other Authorities

Witkin, *California Procedure 4th* (1997)	22
Charles Alan Wright *et al.*, *Federal Practice and Procedure* (2004)	4, 25

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in the legal issue presented by this case: whether an unsuccessful takings plaintiff who has been provided a full and fair hearing on his claims in state court can later file takings claims in federal court, with no consequence attached to the judgment of the state courts.

Land use regulation is one of the essential functions of state and local governments and is subject to extensive control through state statutes and state and federal constitutional prohibitions against uncompensated takings. Through the mechanism of judicial review, state courts ensure that land use regulators comply with both state and federal law.

Since 1790, the Full Faith and Credit Statute has required that a federal court give the same preclusive effect to a judgment of a state court as would that State's courts. *See* 28 U.S.C. § 1738. This statute is fundamental to the functioning of the federal system. The court of appeals properly applied the statute in this case to bar petitioners from relitigating issues previously decided against them in the state courts.

Because adoption of petitioners' position would result in vexatious, duplicative and wasteful litigation and violate basic principles of federalism, *amici* submit this brief to assist the Court in its resolution of the case.

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[1] The parties have consented to the filing of *amicus curiae* briefs and have filed blanket consent letters with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. Petitioners argue that because *Williamson County Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), requires a takings plaintiff to exhaust state judicial remedies to ripen a federal takings claim, "the federal courts [are] required to disregard the decision of the state court" and provide them with a hearing on the merits of their federal claim. Pet. Br. 8. To the contrary, the Full Faith and Credit Statute, 28 U.S.C. § 1738, expressly bars this result.

Section 1738 requires a federal court to give a state court judgment the same effect as would that State's courts. If the State's courts would give preclusive effect to determinations of fact and law so must the federal court. This Court has made clear that even if a litigant brings only a state law claim in state court, a subsequent federal court suit raising a federal claim can be precluded if the elements of the federal and state claims are "virtually identical," or if issues relevant to the federal claim were necessarily decided by the state court. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 479 (1982). Nor is it relevant that the plaintiff was forced to litigate "in a state proceeding in which he would rather not have been engaged at all." *Allen v. McCurry*, 449 U.S. 90, 104 (1980).

What does matter is that petitioners had a full and fair opportunity to litigate their takings claims in the state courts. Not only did petitioners assert a violation of the federal Takings Clause in their first amended complaint in state court, their second amended complaint, while nominally raising claims under the California Constitution, repeatedly invoked the principles of federal takings law.

Moreover, the Supreme Court of California "analyze[d] their takings claim under the relevant decisions of both [that court] and the United States Supreme Court." Pet. App. 131a. Indeed, the majority opinion in the California Supreme Court extensively discussed the application to petitioners' state law

claims of numerous precedents of this Court. Petitioners thus have had a full and fair hearing on the issue of whether the ordinance caused a taking under federal constitutional principles and further litigation is barred by section 1738.

2. While the Full Faith and Credit Statute sets forth Congress's view on what deference the federal courts must give state court judgments, even if this Court were to create a common law rule of preclusion the judgment below should be affirmed. Petitioners argue that because they were required to go to state court to ripen their federal claim, "the federal courts were required to disregard the decision of the state court." Pet. Br. 8. The consequence of petitioners' rule would be that every time a takings plaintiff loses in state court, a federal takings suit could then be brought in federal court.

Indeed, if federal courts are required to disregard the result of state court proceedings, plaintiffs would be able to bring a federal court suit even when there has been a state-court jury determination that no taking has occurred and the jury instructions were correct as a matter of federal law. Moreover, plaintiffs could bring a subsequent federal court suit challenging the amount of compensation awarded in state court as inadequate under the Fifth Amendment's "just compensation" requirement.

Under petitioners' rule, plaintiffs would always have a second chance to prevail and the governmental defendant would have to prevail twice to defeat a takings claim. This system would greatly increase litigation costs for both parties, require the diversion of limited public funds from other programs, and waste scarce judicial resources. Petitioners' rule belittles the role of the state courts and disregards the principles of comity that are the foundation of the federal system. To contend that federal courts are required to disregard the Supreme Court of California's judgment shows disrespect for state courts and undermines public confidence in them.

3. Nor are petitioners' claims reservable under *England v. Louisiana State Bd. of Medical Exam'rs*, 375 U.S. 411 (1964). While *England* sanctions a right to return to federal court to litigate a federal claim, it does so only within the limited circumstance of *Pullman* abstention. *See Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). There is no general right to reserve claims for adjudication in federal court. *See Allen*, 449 U.S. at 101 n.17. Rather, the right to reserve a claim attaches only where plaintiffs "properly invoke[] federal-court jurisdiction in the first instance on a federal claim" and the federal court orders abstention. *Id.*

Here, the only federal takings claim which was subject to abstention and *England* reservation was petitioners' facial challenge based on the theory that the ordinance did not substantially advance legitimate government interests. *See* 145 F.3d at 1102, 1104-05. In their state court suit, petitioners did not reserve this claim. Rather, they reserved their claim that "[t]he Regulatory Scheme and the City's administrative actions *as applied* to plaintiff violate the Takings Clause of the Fifth and Fourteenth Amendments." J.A. 125 (second amended complaint) (emphasis added). This claim, however, was not properly before the federal courts and was not subject to the court of appeals' abstention order. *See* 145 F.3d at 1102, 1104-05. Thus, petitioners reserved the wrong claim.

Furthermore, there is a fundamental difference between the *Williamson County* rule and *Pullman* abstention that forecloses *England* reservation of federal takings claims. *Pullman* abstention is based "on the desire to improve federal adjudication of federal issues by establishing a certain foundation in state law." 18B Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 4471.1 (2004). In contrast, the purpose of the *Williamson County* rule "is to provide state courts an opportunity to supervise state regulatory practices." *Id.* Petitioners' contention that federal courts are "required to disregard" the results of prior state court

proceedings, Pet. Br. 8, manifests a gross disregard "for the rightful independence of . . . state governments," *Pullman*, 312 U.S. at 501, and creates "a potential source of friction between the state and federal judiciaries." *England*, 375 U.S. at 419.[2]

ARGUMENT

THE LOWER FEDERAL COURTS PROPERLY APPLIED THE FULL FAITH AND CREDIT STATUTE, 28 U.S.C. § 1738, TO DISMISS PETITIONERS' TAKINGS CLAIMS

Both the district court and the court of appeals correctly applied federal law in holding that the doctrine of issue preclusion barred petitioners from re-litigating in the federal courts the legal issue of whether respondent's Hotel Conversion Ordinance effectuated a taking. *See* Pet. App. 16a-21a (Ct. App. Op.); *id.* at 37a-44a (Dist. Ct. Op.). In accordance with circuit precedent applying the Full Faith and Credit Statute, 28 U.S.C. § 1738 (*see* Pet. App. 16a (citing *Dodd v. Oregon*, 136 F.3d 1219, 1225 (9th Cir. 1998))), the court of appeals did exactly what the statute required it do. It examined California law and determined that "the state courts would give preclusive effect to the judgment of the state court" because "(1) the issue decided in the prior case [was] identical [to] the one now presented; (2) there was a final judgment on the merits in the prior case, and (3) the party to be estopped was a party to the prior adjudication." Pet. App. 16a (citing *Stolz v. Bank of America*, 15 Cal. App.4th 217, 222 (1993)).

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[2] Several of petitioners' *amici* make the radical suggestion that the Court overrule or modify *Williamson County*'s requirement of exhaustion of state judicial remedies. But not even petitioners seek this result. It is not the question presented, nor is it fairly included therein. *See* Pet. i. Moreover, for reasons explained below at pp. 26-29, the argument of petitioners' *amici* is without merit.

In petitioners' view, *Williamson County Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), "promised" takings plaintiffs that a federal forum will be available to hear the merits of a federal takings claim upon exhaustion of a State's judicial remedies. *See* Pet. Br. 7. *Williamson County*, however, made no such promise. Although petitioners downplay its importance (*see id.* at 17-19), the Full Faith and Credit Statute is—contrary to petitioners' view—a specific "doctrinal . . . barrier to that result." *Id.* at 7. Petitioners' extraordinary assertion that "because the state court proceedings were required to ripen the federal takings claim under *Williamson County*, the federal courts were required to disregard the decision of the state courts," is irreconcilable with numerous cases applying the statute.

In short, petitioners' position is a prescription for duplicative, wasteful and vexatious litigation. Where, as here, a state court has clearly "analyze[d] [a] takings claim under the relevant decisions of both [the state supreme court] and the United States Supreme Court," *see* Pet. App. 131a, there is no reason to depart from settled precedent and allow plaintiffs two opportunities to litigate their takings claims. Indeed, contrary to the arguments of petitioners' *amici*, there is simply no right to litigate every claim created by federal law in a federal court, let alone do so without regard to the result of prior state court proceedings. The judgment of the court of appeals should therefore be affirmed.

A. *Williamson County* Did Not Overrule The Full Faith And Credit Statute

Petitioners assert that the Court in *Williamson County* "stated clearly and repeatedly, [that] takings plaintiffs may ripen their federal takings claims and then pursue them in federal court." Pet. Br. 10-11. They further contend that "[n]othing in the *Williamson County* opinion even suggests that the outcome of state compensation procedures could

preclude a federal takings claim." *Id.* at 12. Petitioners argue that "[i]t would be both ironic and unfair if the very procedure that the Supreme Court required [takings plaintiffs] to follow before bringing a Fifth Amendment takings claim—a state-court inverse condemnation action—also precluded [them] from ever bringing a Fifth Amendment takings claim." *Id.* (quoting *Santini v. Connecticut Hazardous Waste Management Serv.*, 342 F.3d 118, 130 (2d Cir. 2003)).

Williamson County did not, however, address the applicability of the Full Faith and Credit Statute to a federal takings claim brought in federal court subsequent to a state court judgment. Indeed, nowhere in the opinion's discussion of the *Williamson* plaintiff's failure to seek just compensation through the existing state judicial procedures (or elsewhere in the opinion) did the Court even mention the Full Faith and Credit Statute. *See* 473 U.S. at 175-97.

Thus, it is of no significance that—as petitioners contend—"[n]othing in the *Williamson County* opinion even suggests that the outcome of state compensation procedures could preclude a federal takings claim." Pet. Br. 12. This question was not presented nor reasonably subsumed within the question presented in *Williamson County*. Thus, contrary to petitioners' contention, *Williamson County* did not "promise[]" that "a federal court [would] hear the merits of the federal takings claims . . . they filed in federal court." *Id.*

Indeed, it would have been exceedingly strange for the Court to have made such a promise in light of both the language of the Full Faith and Credit Statute and its cases applying it to various federal claims filed in federal court subsequent to a state court judgment. *See* 28 U.S.C. § 1738; *see also Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980). First enacted in 1790, the statute provides that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the

courts of such State . . . from which they are taken." 28 U.S.C. § 1738.

The Court has observed that Section 1738 was enacted "specifically to insure that federal courts, not included within the [Constitution's Full Faith and Credit Clause] would be bound by state judgments." *Kremer*, 456 U.S. at 483 n.24 (citing *Davis v. Davis*, 305 U.S. 32, 40 (1938)). The Court has further explained that the statute "goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken." *Id.* at 482 (citing *McElmoyle v. Cohen*, 13 Pet. 312, 326 (1839); *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 485 (1813)).

In *Allen*, which involved a federal court suit brought under the same statute (42 U.S.C. § 1983) petitioners invoked here, the Court expressly rejected the notion "that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises." 449 U.S. at 103. As the Court explained, "the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress." *Id.*[3]

[3] It is well established that some federal claims of right must be litigated in state proceedings. For example, there is an extensive body of jurisprudence holding that where a State provides an adequate remedy, a claim alleging that a state tax violates the federal Constitution must be litigated in state court. *See, e.g. National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586-87 (1995) (discussing Tax Injunction Act, 28 U.S.C. § 1341, and comity doctrine). Likewise, under *Younger v. Harris*, 401 U.S. 37 (1971), a federal district court is barred from enjoining pending state criminal proceedings because federal constitutional rights can be vindicated in the state proceeding. *See also Ohio Civ. Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 629 (1986) (barring federal court interference with pending state administrative proceedings even if federal constitutional claims could only be raised in state-court review of agency's decision). And under *Stone v. Powell*, 428 U.S. 465, 494 (1976), a state prisoner cannot bring a federal habeas corpus suit challenging his confinement on the ground that his Fourth Amendment rights were violated if he had "an opportunity for full and fair litigation of [the] claim" in the state courts.

Allen thus held that the plaintiff could not bring a section 1983 suit to relitigate the issue of whether the police violated his Fourth Amendment rights, an issue which had been decided adversely to him in the state criminal proceedings. *See id.* at 92, 104-05. The Court expressly noted that section 1983, like the *Williamson County* opinion relied on by petitioners here, "says nothing about the preclusive effect of state-court judgments." *Id.* at 98. The Court further observed that "nothing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights." *Id.* at 103-04.

The Court explained that "[t]here is . . . no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all." *Id.* And in addressing whether there is "a universal right to litigate a federal claim in a federal district court," *Allen* expressly rejected the notion that state courts lack "the capacity . . . to render correct decisions on constitutional issues." *Id.* at 105.

In *Kremer*, the Court subsequently made clear that section 1738 bars a federal court suit based on a federal right even when a plaintiff litigated only a state law claim in the state court action. *Id.* at 485. *Kremer* involved a claim of employment discrimination under Title VII, 42 U.S.C. §§ 2000e

et seq. *See* 456 U.S. at 463. Under the Title VII scheme, *see* 42 U.S.C. § 2000e-5(c), the EEOC referred Kremer's complaint to the New York State Division of Human Rights, the agency charged with authority to enforce that State's employment discrimination law. *See* 456 U.S. at 463-64 (citing N.Y. Exec. Law §§ 295(6), 296(1)(a)).

The state agency found that Kremer had not experienced discrimination; this finding was upheld by the agency's appeal board. *See id.* at 464. Kremer then filed a petition for review in the Appellate Division of the New York Supreme Court. *See id.* The court unanimously affirmed the agency's order. *See id.* Kremer declined to seek review by the New York Court of Appeals. *See id.*

Following the EEOC's rejection of Kremer's complaint, Kremer brought suit under Title VII in federal district court. *Id.* at 465. The employer defended on the ground of res judicata. *See id.* Initially the district court rejected the defense but after the court of appeals held in another case that a state determination was res judicata in a Title VII action, the district court dismissed the case. *See id.* at 465-66. The court of appeals affirmed. *See id.* at 466.

This Court upheld that judgment. *See id.* The Court acknowledged that under Title VII, "the federal courts were entrusted with ultimate enforcement responsibility." *Id.* at 468. The Court recognized that under the federal scheme "no charge of discrimination may be actively processed by the EEOC until the state remedy has been invoked and at least 60 days have passed, or the state proceedings have terminated." *Id.* at 469 (citing 42 U.S.C. § 2000e-5(c)). The Court also noted that "[n]o provision of Title VII requires claimants to pursue in state court an unfavorable state administrative action" and that it had "interpreted the 'civil action' authorized to follow consideration by federal and state administrative *agencies* to be a 'trial *de novo*.'" *Id.* (quoting *Chandler v. Roudebush*, 425 U.S. 840, 844-45 (1976)) (other citations omitted).

The Court observed, however, that "neither the statute nor our decisions indicate that the final judgment of a state *court* is subject to redetermination at such a trial." *Id.* at 470. And while Title VII requires the EEOC to "give 'substantial weight' to findings made in state proceedings, [the statute] indicates only the minimum level of deference the EEOC must afford all state determinations; it does not bar affording the greater preclusive effect which may be required by § 1738 if judicial action is involved." *Id.* The Court reasoned that its earlier decisions holding "that *initial resort* to state administrative remedies does not deprive an individual of a right to a federal trial *de novo* on a Title VII claim . . . is not a holding that a prior state court judgment can be disregarded." *Id.* at 477 (citing *Chandler*, 425 U.S. 840; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). And the Court further explained that although Congress vested "'final responsibility for enforcement of Title VII . . . with federal courts,'" this did not imply that "Congress intended to deny finality to decisions in" the state courts. *Id.* (quoting *Alexander v. Gardner-Denver*, 415 U.S. 36, 44 (1974)).

Most significantly for this case, it did not matter that the claims Kremer "presented to the [state agency] and subsequently reviewed by the [New York courts] were necessarily based on New York law." *Id.* at 479. As the Court reasoned, "the alleged discriminatory acts are prohibited by both federal and state laws. The elements of a successful employment discrimination claim are virtually identical[.]" *Id.* (footnote omitted). The Court therefore held: "[t]he Appellate Division's affirmance of the [state agency's] dismissal necessarily decided that petitioner's claim under New York law was meritless, and thus it also decided that a Title VII claim arising from the same events would be equally meritless." *Id.* at 480.

Allen and *Kremer* thus establish that the Full Faith and Credit Statute requires a federal district court to give preclusive effect to those issues of both fact and law which were

decided in a state court proceeding. As the Court explained in *Allen*, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." 449 U.S. at 94 (citing *Montana v. United States*, 440 U.S. 147, 153 (1979)). Moreover, as *Kremer* demonstrates, it does not matter that the state court proceeding was based only on a state law claim. *See* 456 U.S. at 479. Finally, it is irrelevant that the plaintiff was forced to litigate "in a state proceeding in which he would rather not have been engaged at all." *Allen*, 449 U.S. at 104.[4]

What does matter is that petitioners had "a full and fair opportunity to litigate the . . . issue" in the state courts. *Id.* at 101. In their first amended complaint in state court, petitioners alleged that "'[t]he City's ordinances and its administrative actions regarding the San Remo violate plaintiffs' *federal and state constitutional rights* in that they fail to substantially advance legitimate government interests *as required by the Takings Clause of the Fifth Amendment to the United States Constitution* and Article I, Section 19, of the California Constitutional [*sic*].'" *San Remo Hotel, L.P. v. City of San Francisco*, 83 Cal.App.4th 239, 247 (2000) (quoting petitioners' third cause of action) (emphasis added). The complaint further alleged that "[t]he application of the City's ordinances to plaintiffs forces them, and a small group of other property owners, to bear the full cost of providing a general public benefit: housing for low income, elderly and disabled San Francisco residents. *This violates the Takings Clause. . . .*" *Id.* (emphasis added).[5]

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[4] It should be noted that petitioners voluntarily invoked *Pullman* abstention and sought to return to state court. *See* 145 F.3d at 1104-05. It is also significant that petitioners did not seek to return to state court until they lost in the federal district court. *See id.* at 1100-01.

[5] The California Court of Appeals' discussion of the proceedings in the California Superior Court casts serious doubt on petitioners' assertion that "the state court did not even consider the federal constitutional claim, much less rule on it." Pet. Br. 8. The Superior Court clearly ruled on the City's demurrer to petitioners' takings claim, which was expressly based on the federal Takings Clause. *See* 83 Cal. App.4th at 248. The trial court ruled on the merits of petitioners' facial takings challenge, rejecting it not once but twice. *Id.* Even if the facial takings challenge in the second amended complaint no longer alleged a violation of the Fifth Amendment, having suffered an adverse ruling on the merits with respect to the federal facial challenge raised in the first amended complaint petitioners were required to appeal the dismissal of the federal claim in the state courts. Their failure to do so should be deemed a waiver and bar to relitigation of that claim in the federal courts. Nor is petitioners' "as-applied" federal claim properly before the federal courts. *See* discussion *infra* at p. 24.

Moreover, while in their second amended complaint petitioners separately pleaded their state and federal takings claims, it is clear that the state takings claims were based on this Court's Fifth Amendment jurisprudence. For example, petitioners' second cause of action, which was based on inverse condemnation, alleged that the zoning administrator's classification of their property and the replacement housing fee "amounts to just the sort of exaction which could be classified, not as 'a valid regulation of land use but an out-and-out plan of extortion.'" J.A. 104-05 (¶ 22) (quoting *Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1070 (N.Y. 1989) (other quotations omitted)). Beyond the fact that the key language attributed to the New York Court of Appeals comes directly from *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (citation omitted), it would be strange to rely on an opinion of the New York Court of Appeals for a correct statement of the California law of takings. Rather, petitioners' state takings theory was based on the federal standard, as was their allegation that the zoning administrator's classification of their property "precludes all economically viable use of [their] property." J.A. 105 (¶ 24). *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (other citations omitted)).

Petitioners' third cause of action, which was also based on inverse condemnation, alleged that the replacement housing fee "is not roughly proportional to the impact of the historically permitted . . . use of the San Remo," that "the fee fails to substantially advance a legitimate government interest," and that "[t]he requirement of the fee denies San Remo economically viable use of the hotel." J.A. 107 (¶ 30). The source of the first formulation is *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), the second *Agins* and other cases, *see* 447 U.S. at 260, and the third *Lucas*, *Agins* and *Penn Central*. *See Lucas*, 505 U.S. at 1015-16, *Agins*, 447 U.S. at 260, *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 138 n.36 (1978)). The same cause of action further alleged that "[a]s a direct result of the City's conduct, plaintiffs are also being deprived of their reasonable investment backed expectation." J.A. 118 (¶ 62). This, too, is a formulation of federal takings law. *See Penn Central*, 438 U.S. at 124 ("interfere[nce] with distinct investment-backed expectations" is a "relevant consideration[]").

Petitioners' fourth and fifth causes of action in state court are also based on this Court's jurisprudence, alleging that the HCO and fee "fails to substantially advance legitimate government interests, deprives plaintiffs of the opportunity to earn a fair return on their investment, [and] denies plaintiffs economically viable use of their property." J.A. 119 (¶ 68); *id.* at 120 (¶ 69). *See also id.* at 120 (¶ 73) ("[t]he City's application of its legislative scheme to the San Remo does not substantially advance a legitimate government interest"); *id.* at 121 (¶ 74; alleging that government cannot "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"); *compare with Armstrong v. United States*, 364 U.S. 40, 49 (1960); J.A.121 (Complaint ¶ 75; repeating allegation that fee is not "a valid regulation of land use but an out-and-out plan of extortion") (citation & quotations omitted); *compare with Nollan*, 483 U.S. at 837; J.A. at 122 (¶ 77; "The City's ordinances and defendants' administrative actions also preclude all economically viable use of plaintiffs' property."); *compare with Lucas*, 505 U.S. at 1015-16.

Moreover, the judges of the California state courts did exactly what the Supremacy Clause of the federal Constitution required them to do. *See* U.S. Const. art. VI, cl. 2. Notwithstanding that petitioners' takings claims in the second amended complaint were brought only under the California Constitution, the Supreme Court of California "analyze[d] [petitioners'] takings claim[s] under the relevant decisions of both [the state supreme court] and the United States Supreme Court." Pet. App. 131a (opinion of the Supreme Court of California). Indeed, the majority opinion of the state supreme court extensively discussed the application to petitioners' state takings claims of the principles this Court articulated in *Nollan* and *Dolan*, as well as other relevant federal precedents. *See id.* at 132a-37a, 140a-43a (discussing *Nollan* and *Dolan*). *See also id.* at 131a (citing *Lucas*, 503 U.S. at 1015, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493-501 (1987); *Penn Central*, 438 U.S. at 124); *id.* at 139a n.12 (citing *Penn Central*, 438 U.S. at 132); *id.* at 143a (citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999)); *id.* at 143a-44a (citing *Penn Central*, 438 U.S. at 133); *id.* at 148a-49a (discussing applicability of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), *Keystone*, 480 U.S. at 491 & n.21, & *Agins*, 447 U.S. at 262); *id.* at 149a-52a (discussing *Agins* & *Penn Central*).

The opinions of the concurring and dissenting justices in the state supreme court also extensively discussed this Court's takings jurisprudence. *See id.* at 165a-66a (Baxter, J., concurring and dissenting) (noting agreement "with the majority that in-lieu fees assessed under the HCO are not subject to the 'rough proportionality' test articulated in *Dolan*," and that the applicable "legal standard" is that "'[a] land use regulation does not effect a taking if it "substantially

advances legitimate state interests"'") (quoting *Dolan*, 512 U.S. at 385). *See also id.* at 166a (discussing *Del Monte Dunes* & *Nollan*), *id.* at 181a-82a, 184a (Brown, J., dissenting) (discussing *Nollan* & *Dolan*), *id.* at 189a-92a (discussing *Pennsylvania Coal* & *Penn Central*).

Where, as here, the state courts provided petitioners with a full and fair opportunity to litigate the issue of whether the city took plaintiffs' property, the requirements of the Full Faith and Credit Statute are met. And while it is clear that under this Court's precedents the City did not take petitioners' property, even if the Supreme Court of California erred in its application of federal law to their state claim, petitioners are not entitled to relitigate the issue in federal court. As the Court has explained, plaintiffs cannot "relitigat[e] federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous." *Allen*, 449 U.S. at 101. [6]

B. Even If Federal Courts Were Authorized To Create Federal Common Law Regarding The Effect To Be Given State Court Judgments, Petitioners' Rule Would Be Ill-Advised

As explained above, by enacting § 1738 Congress has spoken on the matter of what deference the federal courts must give the judgment of the Supreme Court of California in this case. Under the Full Faith and Credit Statute, the federal courts are not free to create their own rules as to what effect a

[6] Petitioners ignore that the Ninth Circuit extensively reviewed the Supreme Court of California's analysis of the federal precedents to ensure that the state court's reasoning was "equivalent to the approach taken in this circuit." Pet. App. 19a-21a. While this occurred in the context of ruling on the applicability of section 1738, a fair reading of the opinion shows that the court of appeals' analysis is essentially the same as a ruling that petitioners had failed to state a claim upon which relief could be granted.

state court judgment has in federal court. *See, e.g., Kremer*, 456 U.S. at 481-82. *Cf. Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001) ("*this* Court . . . has the last word on the claim-preclusive effect of *all* federal judgments"). But even if the degree of respect that a federal court owes a state court judgment were a matter of federal common law, the result sought by petitioners would be unwarranted.

Petitioners contend that "because the state court proceedings were required to ripen the federal takings claim under *Williamson County*, the federal courts were required to disregard the decision of the state court." Pet. Br. 8. Petitioners further argue that it is "unfair" to bar their takings claims from federal court. *Id.* at 8-9 (quoting *Santini*, 342 F.3d at 130.) What would be "unfair," however, would be to allow petitioners to relitigate issues that they have already argued and lost in state court proceedings.

Indeed, were a judgment in a state court takings case to have no preclusive effect on a federal takings claim filed in federal court, the federal courts would be inundated with duplicative takings litigation. The consequence of petitioners' rule would be that every time a takings plaintiff lost in state court, a federal takings suit would likely then be brought in federal court.

Under petitioners' view, plaintiffs could—as petitioners have done here—bring a federal takings suit challenging a state court holding that the allegations of the complaint do not establish a taking. Likewise, if federal courts are "required to disregard" the results of state court proceedings, Pet. Br. 8, plaintiffs would be able to bring a federal court suit even when there has been a state court jury determination that no taking has occurred. *Cf. Del Monte Dunes*, 526 U.S. at 720-21 ("the issue whether a landowner has been deprived of all economically viable use of his property is a predominately factual question" and thus "for the jury"); *id.* at 721 (holding that whether the City of Monterey's actions in reviewing

development applications "substantially advance[d] legitimate public interests" was a jury question). *See also Alabama DOT v. Land Energy, Ltd.*, 886 So.2d 787 (Ala. 2004) (jury trial on regulatory takings claim); *Drake v. Town of Sanford*, 643 A.2d 367, 369 (Me. 1994) (jury verdict on whether ordinance substantially advanced legitimate government interests); *Corey v. Town of Merrimack*, 666 A.2d 1359, 1360 (N.H. 1995) (jury trial on whether property owner "was substantially deprived of the economically viable use of the land"). And they could do so even when the state jury instructions were correct as a matter of federal law.

Moreover, if a state judgment has no preclusive effect, plaintiffs could bring a subsequent federal court suit challenging whether the amount of compensation awarded in the state court proceeding was constitutionally adequate under the Fifth Amendment's "just compensation" requirement. And takings plaintiffs could do so even when they had a jury trial in state court on the issue. This would hold true whether the Fifth Amendment claim arose out of an inverse condemnation action as in this case or an eminent domain proceeding.

The net result of petitioners' position is that takings plaintiffs would always have two separate opportunities to prevail by filing actions: first in state court and, if unsuccessful, thereafter in federal court. Concomitantly, the governmental defendant would have to prevail not once but twice.

Such a system has nothing to commend it. Not only would it greatly increase litigation costs for both parties, it would be especially burdensome on governmental defendants as it would require the diversion of limited public funds from other programs to pay legal fees and other litigation costs. Moreover, it would waste scarce judicial resources. *See Allen*, 449 U.S. at 94; *Montana v. United States*, 440 U.S. at 153-54.

Petitioners' view ignores the role of the state courts and disregards the principles of comity that are the foundation of the federal system. By virtue of the Supremacy Clause, *see* U.S. Const. art. VI, cl. 2, state judges are bound to abide by this Court's takings jurisprudence in interpreting state law and adjudicating state takings claims. *Cf. Testa v. Katt*, 330 U.S. 386, 394 (1947); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997) (principal op. of Kennedy, J.) ("Interpretation of federal law is the proprietary concern of state, as well as federal, courts."). As explained above, the Justices of the Supreme Court of California fully satisfied their obligation to respect federal rights under the Fifth Amendment in interpreting the California Constitution. *See* discussion *supra* at pp. 15-16.[7] They clearly applied federal law in analyzing the merits of petitioners' state law claims.

Petitioners further assert that "[t]he practical effect of the Ninth Circuit's rule . . . when combined with the ripeness requirement of *Williamson County* is that federal takings claims can never be considered on the merits in any federal court, including this Court." Pet. Br. 14. That is simply untrue.[8] Petitioners could have pursued their federal claims in

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[7] *See also Santa Monica Beach, Ltd., v. Santa Monica Rent Control Bd.*, 968 P.2d 993, 998 (Cal. 1999) ("We begin by recognizing the well-established case law of the United States Supreme Court . . . ."); *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 860 (Cal. 1997) ("[E]ven if we did intend to interpret the state [takings clause] more narrowly than the federal right, the federal Constitution would nevertheless apply here to protect Kavanau.").

[8] Petitioners erroneously assert that "[a]ll seven justices of the California Supreme Court stated that they expected that the Field Brothers would obtain a ruling on the merits of their federal claims in this federal court action." Pet. Br. 15 n.2 (citing Pet. App. 107a n.1). While the California Supreme Court majority acknowledged that petitioners "explicitly reserved their federal causes of action," Pet. App. 107a n.1, they expressed no view on whether the Full Faith and Credit Statute would preclude relitigation in the lower federal courts of issues that the state courts had already decided. Similarly, the opinion concurring in part

state court—indeed they initially did exactly that with respect to their facial challenge, *see* 83 Cal.App.4th at 247—and sought review in this Court if the state courts denied their claims. Even if the state courts would have treated some of petitioners' federal claims as unripe at the time the lawsuit was filed—a dubious assertion on their part given the numerous instances in which federal takings claims have been adjudicated on the merits along with state law claims, *see* cases cited *infra* at pp. 22-23, the claims would have eventually ripened and the state courts would have rendered a judgment on them. That judgment would have been reviewable in this Court.

To contend as petitioners do that the federal courts are required to disregard the Supreme Court of California's judgment is insulting to the judges of state court systems and undermines public confidence in the state courts as institutions. Under petitioners' position, *see* Pet. Br. 15, it is not, as they assert, the Fifth Amendment which is diminished in significance, but rather the state courts which are "relegated to the status of a poor relation" of their federal counterparts. *Dolan*, 512 U.S. at 392.

This Court long ago rejected the notion that the state courts lack "the capacity . . . to render correct decisions on constitutional issues" and has repeatedly expressed its "confidence in their ability to do so." *Allen*, 449 U.S. at 105. Indeed, "[a] doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism." *Coeur d'Alene Tribe*, 521 U.S. at 275 (principal op. of Kennedy, J.) And in elevating the Takings clause to the

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and dissenting in part does no more than express those justices' understanding of petitioners' intentions. *See id.* at 170a ("Plaintiffs have reserved their federal claims and, if rebuffed here, will resume their federal litigation, which is now subject to *Pullman* abstention."). This statement says nothing about whether § 1738 would bar relitigation of issues already decided adversely to them under the same legal standard. *Cf. Kremer*, 456 U.S. at 479-80.

status of favored son in contrast to other federal rights, which cannot be relitigated in federal court following an adequate state court proceeding, petitioners do not explain why the Takings clause warrants such treatment. *Cf. Hickerson v. City of New York*, 146 F.3d 99, 103 (2d Cir. 1998) (applying issue preclusion to bar First Amendment claim brought in federal court following state court's rejection of state constitutional claim because "the same issues . . . were resolved against [plaintiffs] in state court"); *see also id.* at 112 (observing that "the issues decided and the standards applied by the New York courts are the same as those that would be dispositive under the First Amendment").

C. Petitioners' Claims Are Not Exempt From Preclusion Under Section 1738

When petitioners finally address the relevance of section 1738 to this case, they distort the significance of this Court's holdings in *Allen* and *Migra*, asserting that they "only hold that there is no blanket exemption from issue and claim preclusion for suits brought under § 1983." Pet. Br. 17. As explained above, however, these cases establish "that issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered." *Migra v. Warren City School Dist.*, 465 U.S. 75, 83 (1984) (citing *Allen*, 449 U.S. at 97-99). *Migra* further holds that § 1983 "does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims." *Id.* at 85. Thus, if California law would bar litigation of a claim that could have been but was not raised in an earlier proceeding, the Full Faith and Credit Statute requires that a federal court dismiss the claim.

"In our system of jurisprudence the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another

forum." *Kremer*, 456 U.S. at 485. Contrary to the views of petitioners, *see* Pet. Br. 17-19, the exceptions to the application of section 1738 are limited. One exception is "where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court." *Allen*, 449 U.S. at 101. But as shown above, the California courts clearly provided petitioners with a full and fair hearing on the issue of whether the City's ordinance caused a taking of their property under the applicable federal principles. *See* discussion *supra* at pp. 13-16.

Nor can petitioners deny that the California courts provided them a full and fair opportunity to litigate their federal claims. Petitioners categorically assert that "the California courts could not have decided the federal takings claims because those claims are subject to the same ripeness requirements when brought in state court as they are in federal court." Pet. Br. 15 (citing *Breneric Associates v. City of Del Mar*, 69 Cal.App.4th 166 (1998)). The authority they cite for this proposition, however, is not the Supreme Court of California, which has the last word on California law, but an intermediate appellate court whose decisions are not controlling beyond its own geographic area and was not binding precedent in their case. *See* 9 Witkin, Cal. Proc. 4th *Appeal*, § 934, at 971 (1997) ("One district or division may refuse to follow a prior decision of a different district or division.").

Most tellingly, the Supreme Court of California has adjudicated federal takings claims arising in several cases arising in the same procedural posture as plaintiff's state court suit—that is, where the federal claim is litigated simultaneously with the state law claim. *See Santa Monica Beach, Ltd. v. Santa Monica Rent Control Bd.*, 968 P.2d 993, 1000-07 (Cal. 1999) (adjudicating merits of federal takings claim brought in inverse condemnation case); *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851 (Cal.1997) (same); *Ehrlich v. City of Culver City*, 911 P.2d 429, 435 (Cal.1996) (petition for

writ of mandate and complaint for damages). Moreover, having failed to pursue these claims in the state courts—and notwithstanding that petitioners initially litigated their facial federal takings claim in the state courts, *see* discussion *supra* at 12—petitioners cannot claim that the California courts denied them a fair opportunity to litigate their federal claims.

No more persuasive is petitioners' attempt to prevent the application of section 1738 by invoking *England v. Louisiana State Bd. of Med. Exam'nrs*, 375 U.S. 411 (1964). *See* Pet. Br. 17-18; *see also id.* at 12-14. True enough, *England* sanctions a right to return to federal court to litigate a federal claim. But it does so only within the limited circumstance of abstention under *Railroad Comm'n v. Pullman Co., Inc.*, 312 U.S. 496 (1941), where a federal court exercises its equitable discretion to refrain temporarily from deciding a case because of unsettled issues of state law and to prevent needless friction with state policy. As *Allen* explains:

> The holding in *England* depended entirely on this Court's view of the purpose of abstention in such a case: Where a plaintiff properly invokes federal-court jurisdiction in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction. Abstention may serve only to postpone, rather than to abdicate, jurisdiction, since its purpose is to determine whether resolution of the federal question is even necessary, or to obviate the risk of a federal court's erroneous construction of state law.

449 U.S. at 101 n.17 (quoting *England*, 375 U.S. at 415, 416 & n.7).

Petitioners cannot invoke *England* to avoid the application of section 1738 for several reasons. First, as *Allen* demonstrates, there is no general right to reserve claims for adjudication in federal court. Rather, the right to reserve arises only when a plaintiff "properly invokes federal-court jurisdiction in the first instance on the federal claim," *id.*, and the federal court orders abstention.

Here, the only one of petitioners' federal takings claims which was properly brought in federal district court in the first instance and thus subject to *England* reservation was their facial challenge based on the theory that the ordinance did not substantially advance legitimate government interests. *See* 145 F.3d at 1102, 1104-05; *see also Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). But this was the same claim which petitioners litigated in the state courts. *See* 83 Cal. App.4th at 247 (quoting first amended complaint in state court) ("The City's ordinances and its administrative actions regarding the San Remo violate plaintiffs' federal and state constitutional rights in that they fail to substantially advance legitimate government interests as required by the Takings Clause of the Fifth Amendment to the United States Constitution and Article I, Section 19 of the California Constitutional [*sic*].").

Petitioners' second amended state court complaint, however, did not reserve their facial challenge. Rather, petitioners reserved their federal claim that "[t]he Regulatory Scheme and the City's administrative actions *as applied* to plaintiff violate the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution." J.A. 125 (emphasis added). This claim, however, was unripe and not properly before the federal courts, and not subject to the court of appeals' abstention order. *See* 145 F.3d at 1105 ("We reverse the district court's dismissal of Field's facial takings claim and remand with instructions to enter a stay under *Pullman*.") (footnoted omitted). Thus, petitioners reserved the wrong claim.

Moreover, even if the Court were to overlook petitioners' procedural default, expanding the *England* rule to as-applied takings claims would untether the doctrine from its analytical moorings. In contrast to the discretionary nature of *Pullman*, the text of the Fifth Amendment requires a plaintiff seeking compensation to pursue a State's takings remedies, including

judicial remedies. *See Williamson County*, 473 U.S. 194-95 & n.13. *See also* Pet. Br. 13 ("*Williamson County*'s ripeness requirement is mandated by the Fifth Amendment").

Moreover, the purpose of the *Williamson County* rule is fundamentally different than that served by *Pullman* abstention. As a leading authority observes, "the purpose of [the *Williamson County*] ripeness doctrine is to provide state courts an opportunity to supervise state regulatory practices." 18B Charles A'an Wright *et al.*, *Federal Practice and Procedure* § 4471.1 (2004). As Wright & Miller further explain:

> The reasons for denying an opportunity to reserve federal questions in these circumstances seem reasonably clear. The policies that compel prior resort to state courts are different from the policies of "Pullman" abstention, and reflect a different balance between the imperative of federal subject-matter jurisdiction and deference to state interests. Pullman abstention rests on the desire to improve federal adjudication of federal issues by establishing a certain foundation in state law. In a real sense, the very purpose of resort to state court is to support the eventual return for federal adjudication of federal questions properly brought to federal court. In these other settings, prior resort to state court is compelled by policies that include a desire to support the role of state adjudication.

Id.

Thus, totally without merit is petitioners' suggestion that "any procedural difference between the *Williamson County* ripeness doctrine and the *Pullman* abstention doctrine 'is not a meaningful one.'" Pet. Br. 13 (quoting *Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 129 (2d Cir. 2003)). Not only is there a meaningful procedural difference between the two—in *Pullman* the federal district court retains jurisdiction, while in *Williamson* the federal claim is dismissed—there is also a fundamental difference in

the policies which the rules effectuate. Indeed, it is petitioners' contention that federal courts are "required to disregard the decision of the state court," Pet. Br. 8, that manifests a gross disregard "for the rightful independence of the state governments" and would strain the "harmonious relation[s] between state and federal authority." *Pullman*, 312 U.S. at 501 (internal quotations and other citations omitted).[9] *See also England*, 375 U.S. at 419 (allowing relitigation in federal court of claims submitted to state court "would . . . be a potential source of friction between the state and federal judiciaries"). The Court should therefore reject this incongruous, unnecessary and unwarranted result.

D. The Court Should Disregard The Suggestion Of Petitioners' *Amici* To Overrule *Williamson County*

Several *amici* supporting petitioners urge this Court to overrule *Williamson County* or modify it by abolishing the requirement that takings plaintiffs pursue their compensation

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[9] *Amici* agree with the City that the court of appeals properly applied California law in holding that the California courts would apply the doctrine of issue preclusion to bar petitioners from relitigating the issues. *See* Pet. App. 16a-21a. As the court of appeals stated, the Supreme Court of California expressly recognized that "it had construed [the state and federal takings] clauses congruently," and that "in reaching its decision on the merits of the plaintiffs' state takings claims, it applied 'the relevant decisions of both this court and the United States Supreme Court.'" *Id.* at 17a (quoting 27 Cal. 4th at 664), *reprinted at* Pet. App. 130a. As noted by the court of appeals, petitioners "were a party to the state court adjudication" and there "was a final judgment on the merits." *Id.* at 16a. Moreover, "the facial and as-applied takings challenges raised in state court are identical to the federal claims asserted by the plaintiffs, and are based on the same factual allegations." *Id.* at 17a. Accordingly, under California preclusion law, "the issue decided in the prior case is identical with the one now presented." *Id.* at 16a (citing *Stolz*, 15 Cal. App.4th at 222); *see also Coscia v. McKenna & Cuneo*, 25 P.3d 670, 673 n.1 (Cal. 2001) ("the issue necessarily decided in the previous proceeding is identical to the one that is sought to be relitigated").

claims in the state courts. *See, e.g.*, Br. *Am. Cur.* Defenders of Property Rights 7-18; Br. *Am. Cur.* Franklin P. Kottschade 4-15. The Court should reject this radical suggestion for several reasons.

First, not even petitioners seek this result. It is not the question presented, *see* Pet. i, nor is it "'fairly included therein.'" *Yee*, 503 U.S. at 535 (quoting S.Ct. Rule 14.1(a)). Rather, the issue in this case is whether a federal court must apply principles of issue preclusion to state court proceedings undertaken to comply with *Williamson*. Beyond that, petitioners are precluded from arguing that *Williamson* should be overruled because upon reaching the federal court of appeals they voluntarily sought to return to state court by invoking *Pullman*. *See* 145 F.3d at 1104. Petitioners' *amici* simply ignore these dispositive aspects of this case.

Several of petitioners' *amici* attempt to portray the *Williamson* rule as creating a unique class of federal claimants who are required to litigate their claims in state court. *See, e.g.*, Br. *Am. Cur.* Kottschade 20 ("Lower courts have misused *Williamson County* as a device to prevent property owners—alone among citizens—from litigating federal constitutional issues in federal court."); Br. *Am. Cur.* Defenders of Property Rights 17 ("[N]o other class of federal constitutional plaintiffs are [sic] so routinely shut out of the federal courthouse.").

These assertions are, however, just plain wrong. For example, plaintiffs challenging state taxes as violative of federal law have long been required to litigate in state court as long as the State provides an adequate remedy. *See Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 112-16 (1981); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). This rule applies not only to suits for equitable relief but also to actions for damages. It was in existence long before the Court held that section 1983 does not provide a remedy to challenge state taxes. *See National Private Truck*

Council, Inc. v. Oklahoma Tax Comm'n, 515 U.S. 582 (1995); *see also Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871). Among the reasons for this rule is that "federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts." *Fair Assessment*, 454 U.S. at 108 n.6 (internal quotations and citations omitted). It bears noting that taxpayers do not get a second opportunity to litigate in federal court following state court proceedings and are not entitled to reserve their federal claims. Rather, federal review can be obtained only by "seek[ing] review of the state decisions in this Court." *Id.* at 116.

Indeed, the reasons for requiring takings plaintiffs to litigate in state court are even stronger. First, land use regulation is a quintessentially state and local government function. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Second, the law governing zoning, variances, and permitting is highly complex and federal constitutional questions are likely to turn on issues of state land use law. *Cf. Fair Assessment*, 454 U.S. at 108 n.6. Moreover, where "the parties invoke federal principles to challenge state administrative action, the courts of the State have a strong interest in integrating those sources of law within their own system for the proper judicial control of state officials." *Coeur d'Alene Tribe*, 521 U.S. at 276 (principal opinion of Kennedy, J.). *See also City of Chicago v. International College of Surgeons*, 522 U.S. 156, 185 (1997) (Ginsburg, J., dissenting) (recognizing "the vital interest States have in developing and elaborating state administrative law").

As the foregoing demonstrates, systemically the state courts are the proper forum for resolving these disputes. The Court should therefore reject the suggestion of petitioners' *amici* to overrule or modify *Williamson County*'s exhaustion of judicial remedies rule. And consistent with the Full Faith and Credit Statute and structural principles of federalism,

when a takings plaintiff is required to litigate in the state courts, the judgment of the state courts must be respected. Because petitioners had a full and fair opportunity to litigate in the California courts the issue of whether a taking occurred, this Court should reject their attempt to relitigate the issue in the federal courts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 04-340

In The

Supreme Court of the United States

October Term, 2004

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T&R INVESTMENT CORP.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

Page (s)

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. COLLATERAL ESTOPPEL (ISSUE PRECLUSION) SHOULD NOT BAR FEDERAL COURT ADJUDICIATION OF A FIFTH AND FOURTEENTH AMENDMENT TAKINGS CLAIM 3

II. THE PROCEDURE SET FORTH IN *WILLIAMSON COUNTY,* WHICH REQUIRES A TAKINGS CLAIMANT TO FIRST SEEK JUST COMPENSATION IN STATE COURT IN ORDER TO RIPEN A FEDERAL ACTION, SHOULD BE ELIMINATED 7

A. Landowners Bear a Staggering Burden by Being Forced to Litigate Their Takings Cases in State Court First 8

B. *Williamson County*'s State Court Element has been Resoundingly Criticized by Congress, the Courts, Academics, and Even Planners 9

C. Nothing in the Constitution *Requires* that State Court Litigation Precede Federal Adjudication on the Merits of a Takings Claim 13

III. CONCLUSION 16

TABLE OF AUTHORITIES

Cases **Page (s)**

Armstrong v. United States, 364 U.S. 40 (1960) 6

Ashcroft v. ACLU, 535 U.S. 564 (2002), *aff'd and remanded by* 124 S.Ct. 2783 (2004) 16

Balbirer v. Austin, 790 F.2d 1524 (11th Cir. 1986) 6

Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986) 3

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 4

City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156 (1997) 12, 15

Cumberland Farms, Inc. v. Town of Groton, 808 A.2d 1107 (Conn. 2002) 5

DLX, Inc. v Commonwealth of Kentucky, 381 F.3d 511 (6th Cir. 2004) 4

England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411 (1964) 3, 8

First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 302 (1987) 11-12

Hensler v. City of Glendale, 876 P.2d 1043 (Cal. 1994), *cert. denied*, 513 U.S. 1184 (1995) 4

TABLE OF AUTHORITIES (cont.

Cases **Page (s)**

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Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 15

Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) 8

Miller v. California, 413 U.S. 15 (1973) 16

Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) 15

Mount San Jacinto Cmty. Coll. Dist. v. Superior Court, 11 Cal.Rptr.3d 465 (Cal. App. 2004) 5

Owen v. City of Independence, 445 U.S. 622 (1980) 15

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 3

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) 3, 14

Rekhi v. Wildwood Indus., Inc., 61 F.3d 1313 (7th Cir 1995) 6

San Remo Hotel, L.P. v. San Francisco City & County, 364 F.3d 1088 (2004) ..... *passim*

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342 F.3d 118 (2d Cir. 2003), *cert. denied*,
125 S.Ct.104 (2004) 5-6

Suitum v. Tahoe Reg'l Planning Agency,
520 U.S. 725 (1997) 8

Tahoe-Sierra Pres. Council, Inc. v.
Tahoe Reg'l Planning Agency,
535 U.S. 302 (2002) 3, 6, 15

Townsend v. Sain, 372 U.S. 293 3

Williamson County Reg'l Planning Comm'n v. Hamilton
Bank, 473 U.S. 172 (1985) ..... *passim*

Yee v. City of Escondido, 503 U.S. 519 (1992) 15

Statutes and Bills

28 U.S.C. § 1441(a) 12

Private Property Rights Implementation Act,
H.R. 1534, § 2(e)(3) (1997) 10

Private Property Rights Implementation Act,
H.R. 2372, §2(e)(4) (2000) 10

TABLE OF AUTHORITIES (cont.)

Page (s)

Other

13A Wright, Miller & Cooper, *Federal Practice and*
Procedure, § 3532.1, *Ripeness, Sources of Doctrine*, 123
(2d ed. 1984) 5

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Suitum v. Tahoe Reg'l Planning Agency,
U.S. No. 96-243 11-12

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Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning
Agency, U.S. No. 00-1167 10-11

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Can't Get There from Here: Supreme Court Ripeness
Jurisprudence in Takings Cases at Long Last Reaches
the Self-parody Stage,
36 Urb. Law. 671 (2004) 12, 15

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Reflections on Williamson County, in *Taking Sides on*
Takings Issues: Public and Private Perspectives,
(A.B.A. 2002; Thomas E. Roberts, ed.) 9

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Up the "Ripeness Mess"? A Call for Reform So Takings
Plaintiffs Can Enter the Federal Courthouse,
31 Urb. Law. 195 (1999) 9

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Page (s)

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONERS

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of the petitioners, and letters of consent are filed with the Clerk of the Court.[1]

THE NAHB'S INTEREST ARISES FROM ITS MEMBERS' CONCERNS AS TO THEIR ABILITY TO BRING AN ACTION IN FEDERAL COURT CLAIMING A TAKING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

The NAHB represents over 220,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with a procedure which effectively strips the federal courts of any role in the judicial review process when a takings claim is asserted.

The NAHB has appeared before the Court as an *amicus curiae* or as "of counsel" in a number of cases involving the rights and remedies of landowners who have been adversely affected by governmental actions. These include: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First*

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1 No counsel for any of the parties authored any part of this brief. No person or entity other than the NAHB has made any monetary contribution to the preparation or submission of this brief.

English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987)[2]; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Commun. for a Great Or.*, 515 U.S. 697 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'Ship v. United States Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S.Ct. 1537 (2004); *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), *cert. granted*, 125 S.Ct. 27 (2004); and *Lingle v. Chevron U.S.A., Inc.*, 363 F.3d 846, *cert. granted*, 125 S.Ct. 314 (2004).

SUMMARY OF THE ARGUMENT

Collateral estoppel (issue preclusion) should not apply when a landowner is required to assert a takings claim in state court in order to ripen its federal claim because it effectively denies a federal forum to a plaintiff asserting a federal claim for relief. It is not mandated by anything in *Williamson County* nor does it represent good policy.

Indeed, good policy calls for eliminating the state litigation prong of *Williamson County* all together. Landowners should be allowed to assert their federal constitutional claims in federal court in the first instance.

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2 The Court's opinion cited the NAHB's brief. (483 U.S. at 840.)

ARGUMENT

I.

COLLATERAL ESTOPPEL (ISSUE PRECLUSION) SHOULD NOT BAR FEDERAL COURT ADJUDICATION OF A FIFTH AND FOURTEENTH AMENDMENT TAKINGS CLAIM

This Court has, with a few exceptions not applicable to the case at bar, characterized the jurisdiction of regulatory takings as requiring

> "... 'essentially ad hoc, factual inquiries,' *Penn Central*, 438 U.S., at 124, designed to allow 'careful examination and weighing of all the relevant circumstances.' *Palazzolo*, 553 U.S., at 636 (O'CONNOR, J., concurring)." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002).

A takings claim alleges that governmental action requires the payment of just compensation under the mandate of the Fifth and Fourteenth Amendments. Those claims frequently turn on the facts peculiar to the case.

> "How the facts are found will often dictate the decision of the federal claims. 'It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.' *Townsend v. Sain*, 372 U.S. 293, 312." *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 416-417 (1964).

To the same effect, *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 n. 5 (1986) ("We have frequently recognized the importance of the facts and the fact finding process in constitutional adjudication.").

If the Ninth Circuit's decision is allowed to stand, it will effectively strip the federal courts of any role in the elaboration of takings jurisprudence because of the overlap between state court interpretations of state constitutional protections against uncompensated takings on the one hand, and similar federal law on the other. *DLX, Inc. v. Commonwealth of Kentucky*, 381 F.3d 511, 521 (6th Cir. 2004). Indeed, that was the situation in the case at bar. *San Remo Hotel L.P. v. San Francisco City and County*, 364 F.3d 1088, 1094 (2004). However, there are significant differences between the manner in which facts are found in federal and state courts.

More particularly, an action brought under 42 U.S.C. § 1983 – the mechanism used by the plaintiffs here (364 F.3d at 1093) – requires that factual issues regarding the government's *liability* for a taking must be determined by a jury:

> "[W]e hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly fact question. As our implied acknowledgement of the procedure in *Williamson County, supra*, suggests, in actions at law otherwise within the purview of the Seventh Amendment, this question is for the jury." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720-721 (1999).

On the other hand, a landowner who brings an inverse condemnation action in the State of California has a right to a jury trial "but that right is limited to the question of damages." *Hensler v. City of Glendale*, 876 P.2d 1043, 1052 (Cal. 1994), *cert. denied*, 513 U.S. 1184 (1995). More specifically,

> "In both eminent domain and inverse condemnation proceedings, the issue of just compensation is to be tried to the jury. All other questions of fact, or of mixed fact and law, are to be tried ... without reference to a jury. Consistent with this rule, the court, rather than the jury, typically decides questions concerning the *preconditions to recovery* of a particular compensation, even if the determination turns on contested issues of fact." *Mount San Jacinto Cmty. Coll. Dist. v. Superior Court*, 11 Cal.Rptr.3d 465, 469 (Cal. App. 2004) [internal quotation marks and citations omitted; italics in the original].

See also, *Cumberland Farms, Inc. v. Town of Groton*, 808 A.2d 1107, 1123-24 (Conn. 2002) (landowner had no right to a jury trial on issues of liability in inverse condemnation case). Thus, while *Del Monte Dunes* held that takings claimants have a Seventh Amendment right to a jury trial in the federal courts, the states do not extend a similar right.

Moreover, the resemblance between the state procedure element mandated by *Williamson County*, and abstention, is obvious. Both would defer (or even outright relinquish) federal court jurisdiction in favor of state court adjudication:

> "Ripeness becomes closely mingled with abstention doctrines when deference rests on the prospect of some future state court proceeding rather than an ongoing litigation." 13A Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3532.1, *Ripeness, Sources of Doctrine*, 123 (2d ed. 1984).

The Second Circuit relied on the resemblance between ripeness and abstention in *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 128-129 (2d Cir. 2003), *cert. denied*, 125 S.Ct.104 (2004). *Santini* held that a landowner who was, after all, involuntarily in state court litigating a takings claim, could preserve his right to have a federal court adjudicate his federal takings claim by filing a reservation – similar to that called for in *England*. *Santini* was based on the evident unfairness of first forcing

a landowner into state court in order to ripen his federal claim, and then holding that the act of ripening the federal claim also barred it. (342 F.3d at 130.)

The plaintiffs in the case at bar made use of a *Santini* reservation because they "specifically reserved their federal claims for adjudication in federal court, pursuant to *England* ..." (*San Remo*, 364 F.3d at 1093.) However, the Ninth Circuit just as specifically rejected the use of that procedure. (*id.* at 1095.)

In light of the procedure set forth by this Court in *Williamson County*, the position taken by the Second Circuit states the better policy. *Santini* requires the takings claimant to first seek compensation in state court but, having done so, then allows a full and free adjudication of that claim – including factual determinations – under federal law in a federal court.

Finally, there is simply no jurisdictional bar to the reservation procedure used by the plaintiffs here and endorsed by the Second Circuit. Neither res judicata (claim preclusion) nor collateral estoppel (issue preclusion) is jurisdictional; each of them is an affirmative defense which may be waived. *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 479 (10th Cir. 2002) (res judicata); and *Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1317 (7th Cir 1995) (collateral estoppel). Moreover, whether or not the preclusion doctrines may be triggered in any case is a matter of judicial discretion.[3] In fact, all of the Circuits which have considered the question, including the Ninth Circuit in the case at bar (364 F.3d at 1094), have held that an appropriate reservation "will suffice to defeat claim preclusion in a subsequent federal action." *DLX, Inc., supra*, 381 F.3d at 523 n. 9.

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3 See, e.g., *Balbirer v. Austin*, 790 F.2d 1524, 1526 (11th Cir. 1986) ("We note at the outset that application of collateral estoppel in a particular case is a matter of trial court discretion ... but that this court [on appeal] exercises plenary review over the rules governing collateral estoppel").

"[C]onsiderations of fairness and justice" must support any takings analysis. *Tahoe-Sierra*, 535 U.S. at 333. See also, *Armstrong v. United* States, 364 U.S. 40, 49 (1960)(the Fifth Amendment bars "forcing some people alone to bear the public burden which, in all fairness, should be borne by the public as a whole.") It is neither fair nor just to tell a property owner, "Go to state court before you come to federal court," and then after she pursues that procedure, say "Sorry. You can't get into federal court because the state court already decided your case." The Ninth Circuit's decision should be reversed.

II.

THE PROCEDURE SET FORTH IN *WILLIAMSON COUNTY*, WHICH REQUIRES A TAKINGS CLAIMANT TO FIRST SEEK JUST COMPENSATION IN STATE COURT IN ORDER TO RIPEN A FEDERAL ACTION, SHOULD BE ELIMINATED

The requirement that a landowner first assert a takings claim in state court rests on *prudential* ripeness principles. Thus, *Williamson County* does not present a jurisdictional bar to a federal court determination of whether a taking has occurred and, if so, what just compensation should be awarded. In *Suitum*, this Court stated:

> "The only issue presented is whether Suitum's claim of regulatory taking of her land in violation of the Fifth and Fourteenth Amendments is ready for judicial review under *prudential ripeness principles*. There are *two independent prudential hurdles* to a regulatory takings claim brought against a state entity in federal court. *Williamson County* ... explained that a plaintiff must demonstrate that she has both received a 'final decision regarding the application of the [challenged] regulations to the property at issue' from 'the government entity charged with implementing

> the regulations,' *id.* at 186, and sought 'compensation through the procedures the State has provided for doing so,' *id.*, at 194." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-734 (1997) emphasis supplied; [footnote omitted].

Similarly, in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012-1013 (1992), this Court held that the landowner had "properly alleged Article III injury in fact" and proceeded to a determination on the merits. It did so even though a permit procedure had been implemented while state court litigation was ongoing, because this Court did not think it fair to apply the prudential requirement of finality set forth in *Williamson County*.

A. Landowners Bear a Staggering Burden by Being Forced to Litigate Their Takings Cases in State Court First.

The cost to the landowner of having to detour through state court litigation should give this Court pause. The plaintiffs in the case at bar initially filed their § 1983 action in federal court in May 1993. (*San Remo*, 364 F.3d at 1093.) They will have a decision on *jurisdiction* by mid-2005. Twelve years, and still counting, with no decision by a federal court *on the merits* in sight.

Unfortunately, the resemblance to abstention is also apparent in terms of the time necessary to obtain federal resolution. Forty years ago, Justice Douglas voiced his unhappiness with the delay resulting from abstention, noting that eight and ten year periods between initiation and resolution of a lawsuit were not unheard of. *England, supra*, 375 U.S. at 425-429 (Douglas, J., concurring). As a result, although not raised by the parties, he argued that it was time for this Court, *sua sponte*, to reevaluate the abstention doctrine. (*id.* at 423.)

Professor Daniel R. Mandelker, one of the leading academics of the land use bar and typically an advocate on behalf of local government on land use issues, in his

testimony to Congress, referred to a survey of federal district court cases involving takings claims between 1990 and 1997 and found that 81% of them were decided on procedural grounds and never reached the merits. Testimony of Daniel R. Mandelker Before the Judiciary Committee, U.S. House of Representatives, reproduced at 31 Urb. Law. 234, 236-237 (1999) ("Mandelker Testimony").

That same survey also determined that litigation which did result in an opinion on the merits by a Court of Appeals took, on the average, 9.6 years. John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195, 205 (1999).

B. *Williamson County*'s State Court Element has been Resoundingly Criticized by Congress, the Courts, Academics, and Even Planners.

Put simply, *Williamson County*'s state court procedure is a disaster. Commentators have derided the problems spawned by *Williamson County* as "worse than mere chaos,"[4] "absurd,"[5] "nonsense,"[6] "riddled with

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4 Robert H. Freilich, *The Public Interest is Vindicated: City of Monterey v. Del Monte Dunes*, 31 Urb. Law 371, 387 (1999).

5 Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 17, 27 (1997).

6 Peter A. Buchsbaum, *Should Land Use be Different? Reflections on Williamson County*, in *Taking Sides on Takings Issues: Public and Private Perspectives* 480 (A.B.A. 2002; Thomas E. Roberts, ed.).

obfuscation and inconsistency,"[7] a "Kafkaesque maze,"[8] and "a fraud or hoax on landowners,"[9] just to name a few.

On two occasions, the House of Representatives passed bills (by substantial margins) that would have dispensed with *Williamson County*'s state court procedure element.[10] In reaching that conclusion, the House Judiciary Committee received testimony from Professor Mandelker who declared that his review of lower federal court decisions showed a "wholesale abdication of federal jurisdiction in law suits where issues are raised concerning the constitutional validity of land use regulation," because "federal judges have distorted the Supreme Court's ripeness precedents to achieve [the] undeserved and unwarranted result [of] avoiding the vast majority of takings claims on their merits." Mandelker Testimony, 31 Urb. Law. at 236-237. His conclusion, and testimony, was that the "state court first" requirement should be eliminated.

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7 Mandelker Testimony, 31 Urb. Law. at 236.

8 Timothy J. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West. L. Rev. 1, 51 (1992).

9 Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 71 (1995).

10 See H.R. 1534, 105th Cong., Private Property Rights Implementation Act of 1997 (passed House on Oct. 22, 1997, by vote of 248-178) (§2(e)(3): "[A] final decision shall not require the party seeking redress to exhaust judicial remedies provided by any State ...."); H.R. 2372, 106th Cong., Private Property Rights Implementation Act of 2000 (passed House on Mar. 16, 2000, by vote of 226-182) (§2(e)(4): "[A] case is ripe for adjudication even if the party seeking redress does not exhaust judicial remedies provided by any State ...."). Both bills are available at the Library of Congress's "Thomas" website, http://thomas.loc.gov/ (last visited Jan. 20, 2005).

Even the American Planning Association ("APA"),[11] which submitted an *amicus curiae* brief on behalf of the Tahoe Regional Planning Agency in *Suitum* (No. 96-243), believed that the ripeness requirement set forth in *Williamson County* was wrong; the heading to its fifth argument in that brief states:

> "THE COURT SHOULD ELIMINATE THE SECOND PRONG OF THE RIPENESS DOCTRINE REQUIRING THE LAND-OWNER TO HAVE SOUGHT AND BEEN DENIED JUST COMPENSATION THROUGH AVAILABLE STATE PRO-CEDURES AND ALLOW LANDOWNERS WITH REGULATORY TAKINGS CLAIMS TO PURSUE THEIR FEDERAL REMEDY IN FEDERAL COURT." APA *Suitum Amicus* Br. at 23.

The brief goes on to explain why the APA took the position it did:

> "*Amicus curiae* submits that the rule the takings plaintiffs must first sue in state court for compensation under the federal constitution is incorrect. When this Court first adopted the ripeness rules, there was no remedy for compensation in federal courts. Indeed, this Court adopted ripeness rules to avoid deciding whether a federal compensation remedy is available. In the absence of a federal compensation remedy, it perhaps made sense

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11 The APA has described itself as "the oldest and largest organization devoted to advancing state and local land use planning," and its constituents are "those charged with addressing the public's interest in how land is used and with drafting regulations to ensure that the impacts of adverse land use are minimized." APA *Amicus* Br., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, (No. 00-1167) at 1.

to require takings plaintiffs to seek a state compensation remedy first.

> "This situation has now changed. In 1987, in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U. S. 302 (1987), this Court held that a remedy for compensation in takings cases is available under the federal constitution. Federal courts should not require takings plaintiffs to go to court to seek compensation before taking advantage of this federal remedy." APA *Suitum Amicus* Br. at 25-26.

Aside from the serious policy implications that arise from the state court procedures element, commentators have noted that *Williamson County*'s second element is difficult, if not impossible, to reconcile with the holding in *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997).[12] The upshot of *College of Surgeons* is that a municipal defendant, sued by a landowner for a taking and other constitutional violations, may remove that case to federal court. (522 U.S. at 164-66). Yet the pertinent federal statute allows removal from state court *only* if the plaintiff could have filed the case in federal court in the first instance. See 28 U.S.C. § 1441(a). How can that be? How can it be that a takings plaintiff must file his case in state court first (as *Williamson County* purportedly requires), but then a municipal defendant has the option to game the system and control jurisdiction by removing to federal court (under *College of Surgeons*)? Yet, that plaintiff apparently could not have filed in federal court initially, so the removal

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12 The *Williamson County/College of Surgeons* conundrum is fully explained in Michael M. Berger and Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-parody Stage*, 36 Urb. Law. 671, 676-682 (2004).

statute should presumably not apply (but *College of Surgeons* holds removal is appropriate in these circumstances). It hurts just to think through this problem.

Reams of articles will be written on this dilemma, and everyone involved—municipalities, property owners, and the federal judiciary—will spend years scratching their heads on whether, and how, *Williamson County* and *College of Surgeons* can be reconciled. The Eighth Circuit described the situation as an "anomalous ... gap in Supreme Court jurisprudence." *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir.), *cert. denied*, 124 S.Ct. 178 (2003).

In the end, landowners who want to assert a takings claim deserve to know whether, and under what circumstances, they can access a federal forum for their constitutional grievances. Respectfully, the only way to have those questions completely and fairly answered is for this Court to now re-consider *Williamson County's* state court detour procedure and tackle it head-on.[13]

C. Nothing in the Constitution *Requires* that State Court Litigation Precede Federal Adjudication on the Merits of a Takings Claim.

It must be noted that just compensation can only be awarded after a taking has been found. That does not represent a problem when a governmental entity has taken

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13 As a practical matter, the only realistic opportunity the Court will have to directly address the state court procedures element from *Williamson County* is in a case postured such as the one at bar. In the current jurisprudential climate, it would border on malpractice for an attorney to direct his client to file a takings claim in federal court initially. This is especially so in light of the *Kottschade* case, where the property owner filed initially in federal court but the Eighth Circuit required him to repair to state court. As the Eighth Circuit concluded, resolution of the *Williamson County/College of Surgeons* conundrum "is for the Supreme Court to say, not us." (319 F.3d at 1038.)

possession of land, whether by a physical invasion or by formal condemnation proceedings, because there is no question that a taking has occurred. The only issue left in such a situation is to decide the amount of just compensation to which the landowner is entitled. However, things are not so simple when a landowner alleges that a *regulatory* taking has occurred. In that case, the first issue is whether a taking has occurred at all. This Court's discussion in *Williamson County* on the state compensation procedure ripeness issue focused entirely on the recovery of just compensation; it says not a word about whether a regulatory taking had actually occurred. (473 U.S. at 194-196.)

However, the resulting detour through the state courts means that the issue of whether a regulatory taking has occurred must be litigated by the landowner in the state court proceeding.[14] As it now stands, based on this Court's statement in *Williamson County* that the Fifth Amendment proscribes only taking without just compensation (473 U.S. at 194), there is no federal jurisdiction to determine whether

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14 And yet another puzzle arises. A state inverse condemnation lawsuit begins by determining whether the government is liable for a taking in the first place. In that suit, the state trial court must review the validity and assess the propriety of the municipality's underlying conduct. Yet, in *Williamson County*, this Court held that "[e]xhaustion of review procedures is not required" of § 1983 takings claimants; they do not have to exhaust "administrative and judicial procedures by which an injured party may seek review of an adverse decision ...." (473 U.S. at 194 n. 13; 193). But *that* is an integral part of a state inverse condemnation action – the taking claimant seeks review of an adverse land use decision. Indeed, applying the polestar test from *Penn Central* and conducting an "ad hoc" inquiry into the facts necessarily entails review of the underlying government action. How could the factors from *Penn Central* – the character of the government's action, the economic impact of the regulation, and the property owner's investment-backed expectations (see 438 U.S. at 124) – be considered by a state court *unless* it reviewed the underlying land use decision?

a taking has occurred in an as-applied context where facts are of paramount importance. At the same time, a facial attack – which presents only a question of law – claiming a taking can be brought directly in a federal court. *Yee v. City of Escondido*, 503 U.S. 519, 533-534 (1992).[15]

Of course, the NAHB recognizes that, for takings purposes, the Constitution is infringed only when just compensation is not paid after a taking has occurred. But, nothing in the Constitution requires that a state court must issue some kind of certification that one of its municipalities owes a landowner for a taking. "You can read the Fifth Amendment forward, backward, upside-down or sideways, and you will not find that requirement anywhere." Berger and Kanner, *Shell Game!, supra*, 36 Urb. Law. at 696. A federal court is as well-equipped as a state court to interpret the Fifth Amendment, determine that a municipality has committed a taking, and order the payment of just compensation to avoid a constitutional infraction.[16]

Finally, doomsday cries that federal court review will unduly interfere with local prerogatives ring hollow. E.g., Glenn P. Sugameli, *"Takings" Bills Threaten People, Property, Zoning and the Environment*, 31 Urb. Law. 177 (1999). Federal courts decide matter of local concern all of the time in a variety of parochial contexts. Consider, as one

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15 The Court has remarked on the "uphill battle" facing a takings plaintiff who brings a facial challenge. *Tahoe-Sierra*, 535 U.S. at 321, quoting from *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987).

16 "[A] case containing claims that local administrative action violates federal law ... is within the jurisdiction of federal district courts." *College of Surgeons*, 522 U.S. at 163. There is nothing groundbreaking about that point. Section 1983 states that those acting "under color of state law" must pay when they commit actions that infringe the federal constitution – and that includes municipalities. See *Owen v. City of Independence*, 445 U.S. 622, 636-637 (1980); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

example, the standards for determining whether speech is obscene and therefore loses First Amendment protections. From the Nixon Administration up through the current Bush Administration, it has been well-established that whether an artistic or literary work is obscene is determined by "contemporary community standards" and definitions under the "applicable state law." *Miller v. California*, 413 U.S. 15, 24 (1973). See also *Ashcroft v. ACLU*, 535 U.S. 564 (2002), *aff'd and remanded by* 124 S.Ct. 2783 (2004) (whether on-line materials are harmful to minors will depend in part on "local community standards"). There has never been a requirement that a state court must first determine what those "local community standards" are, as a ripening prerequisite to federal court adjudication of a First Amendment claim.

This would be a much simpler judicial world if this Court were to review its holding in *Williamson County* and make clear that a landowner could, if it wished, go directly to federal court to have a determination made whether, first, a taking had occurred and then, second, what just compensation should be awarded.

III.

CONCLUSION

According to the dean of historians of the American Revolution, an independent judiciary is embedded as an essential part of the constitutional scheme to preserve property rights:

> "Placing legal boundaries around issues such as property rights ... had the effect of isolating these issues from popular tampering, partisan debate, and the clashes of interest-group politics. Some things, including the power to define property and interpret constitutions, became matters not of political interest to be determined by legislatures but of the 'fixed principles' of law to be determined by judges." Gordon S. Wood, *The Radicalism*

> *of the American Revolution* 324-25 (First Vintage Books ed. 1993).

Slamming the doors of the federal courthouse shut on land owners – to the extent that virtually none of the lower federal courts interpret the Just Compensation Clause or adjudicate the merits of takings claim – cannot be countenanced under the Founders' vision.

Accordingly, the NAHB contends that both good policy and this Court's prior opinions require that neither res judicata nor collateral estoppel apply when a landowner is forced to begin litigation in state court in order to ripen a federal takings claim. The *Santini* reservation used by the Second Circuit would at least allow a federal court to adjudicate the federal takings claim.

The NAHB further contends that it is time for this Court to reconsider – and to abandon – the requirement that a landowner first seek compensation through state litigation procedures before its federal takings claim is ripe for adjudication in federal court.

In short, the requirement of initial state court litigation should have no preclusive effect whatsoever on subsequent takings litigation in federal court or, better yet, the requirement should be entirely eliminated.

Dated: January 24, 2005

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BRIEF

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In the Supreme Court of the United States

SAN REMO HOTEL, L.P., ET AL.

Petitioners

v.

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE FOR ELIZABETH J. NEUMONT (AND ALL OTHERS SIMILARLY SITUATED) IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the "state procedures" aspect of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985), which mandates that property owners exhaust state judicial remedies before pursuing federal claims for just compensation in federal court, should be overruled.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

INTRODUCTION 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. In Creating the State Procedures Requirement, *Williamson County* Deviated Sharply from the Established Understanding of the Just Compensation Clause 4

A. At Issue Here Is the Right to Recover Just Compensation for Takings of Private Property for Public Use 4

B. It Was Always the Law That the Right to Recover Just Compensation Accrues at the Time of the Taking 5

II. In Creating the State Procedures Requirement, *Williamson County* Built a House on Jurisprudential Sand 8

A. The Requirement Was Fabricated Without Benefit of Serious Briefing or Argument 9

B. The Requirement Rests Principally on Two Flawed Analogies to Inapposite Decisions 10

1. *Ruckelshaus v. Monsanto Co.* 11

2. *Parratt v. Taylor* 13

C. The Requirement Finds No Support in the Principle That the Amendment Proscribes Only Takings *Without Just Compensation* 14

TABLE OF CONTENTS—Continued

Page

III. The State Procedures Requirement Has Other Defects that Show Its Doctrinal Incoherence. 16

A. The Requirement Is Inconsistent with the No-Exhaustion-of-Remedies Rule Governing Other Federal Rights 16

B. The Requirement Is in Practice Ignored by State Courts and by this Court 18

C. The Requirement Invites Disrespect for State Courts by Treating Them as Mere Stations on the Road to Federal Court 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

Cases

Alliance of Descendants of Texas Land Grants v. United States, 37 F.3d 1478 (Fed. Cir. 1994) 6

Armstrong v. United States, 364 U.S. 40 (1960) 5

City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997) 16

City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687 (1999) 5

Commonwealth v. DLX, Inc., 42 S.W.3d 624 (Ky. 2001) 22

Creppel v. United States, 41 F.3d 627 (Fed. Cir. 1994) 7

DLX, Inc. v. Kentucky, 381 F.3d 511 (6th Cir. 2004) 22

Dolan v. City of Tigard, 512 U.S. 374 (1994) 17

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 5

Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991) 22

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) ..... passim

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999) 17

TABLE OF AUTHORITIES—Continued

Page

Greenfield Mills, Inc. v. Macklin, 361 F.3d 934 (7th Cir. 2004) 7

Grubb v. Public Utilities Commission, 281 U.S. 470 (1930) 21

Hudson v. Palmer, 468 U.S. 517 (1984) 13

Inupiat Community of Arctic Slope v. United States, 680 F.2d 122 (Ct. Cl.), *cert. denied*, 459 U.S. 969 (1982) 7

Jacobs v. United States, 290 U.S. 13 (1933) 5

Jacobs Wind Electric Co., Inc. v. Department of Transportation, 626 So. 2d 1333 (Fla. 1993) 18

Kavanau v. Santa Monica Rent Control Board, 941 P.2d 851 (Cal. 1997), *cert. denied*, 522 U.S. 1077 (1998) 18-19

Lawrence v. Texas, 539 U.S. 558 (2004) 2, 22-23

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 19, 21

Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C. 1991), *rev'd*, 505 U.S. 1003 (1992) 20

Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1997) 19

Neumont v. Monroe County, Florida, 242 F. Supp. 2d 1265 (S.D. Fla. 2002), *appeal docketed*, No. 04-13610-EE (11th Cir. July 22, 2004) 1

TABLE OF AUTHORITIES—Continued

Page

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 1, 19, 21

Palazzolo v. State, 746 A.2d 707 (R.I. 2000), *aff'd in part, rev'd in part*, 533 U.S. 606 (2001) 19-20

Parratt v. Taylor, 451 U.S. 527 (1981) 13-14

Patsy v. Board of Regents, 457 U.S. 496 (1982) 16-18

Payne v. Tennessee, 501 U.S. 808 (1991) 2, 22

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) 20-21

Richardson v. City & County of Honolulu, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 525 U.S. 871, 921, 1018 (1998) 22

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 11-12, 14-15

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) 7-8

Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299 (1923) 6

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 2

Soriano v. United States, 352 U.S. 270 (1957) 6, 16

Stafford Ordinance Corp. v. United States, 108 F. Supp. 378 (Ct. Cl. 1952) 7

TABLE OF AUTHORITIES—Continued

Page

Steel Improvement & Forge Co. v. United States, 355 F.2d 627 (Ct. Cl. 1966) 7

Steffel v. Thompson, 415 U.S. 452 (1974) 16-17, 21, 23

Tafflin v. Levitt, 493 U.S. 455 (1990) 21

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) 14

United States v. Causby, 328 U.S. 256 (1946) 11

United States v. Clarke, 445 U.S. 253 (1980) 6, 8

United States v. Dickinson, 331 U.S. 745 (1947) 6

United States v. Dow, 357 U.S. 17 (1958) 6, 8

United States v. Rogers, 255 U.S. 163 (1921) 6

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) ..... passim

Yee v. City of Escondido, 503 U.S. 519 (1992) 10

Younger v. Harris, 401 U.S. 37 (1971) 20

TABLE OF AUTHORITIES—Continued

Page

Statutes, Legislative Materials, and Court Rules

28 U.S.C. § 1343 17

§ 1491 11

42 U.S.C. § 1983 17

Private Property Rights Implementation Act of 1997, H.R. 1534, 105th Cong. 17

Private Property Rights Implementation Act of 2000, H.R. 2372, 106th Cong. 17

H.R. Rep. No. 106-518 (2000) 17, 20-21

Supreme Court Rule 37.2 1

Rule 37.6 1

Other Authorities

Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here*, 36 URB. LAW. 672 (2004) 16

Brief for Respondent in *Williamson County* (No. 84-4) 10

Brief for the United States as Amicus Curiae Supporting Petitioners in *Williamson County* (No. 84-4) 10

Transcript of Argument in *Williamson County* (No. 84-4), 1985 U.S. TRANS LEXIS 76 (Feb. 19, 1985) 10

INTEREST OF AMICI CURIAE

Amici curiae are a certified class of property owners in Monroe County, Florida, who are currently litigating a federal takings claim in the Court of Appeals for the Eleventh Circuit. *See Neumont v. State of Florida*, No. 04-13610-EE (appeal docketed July 22, 2004). Like petitioners (and thousands of other property owners across the nation), amici are facing "ripeness" arguments by a governmental defendant who seeks to avoid federal adjudication of a federal constitutional claim. In particular, despite class members having filed at least two actions in state court concerning the regulatory action for which they now seek just compensation, amici have been denied their day in federal court because they have assertedly failed to satisfy the "state procedures" requirement of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985). *See Neumont v. Monroe County, Florida*, 242 F. Supp. 2d 1265, 1274 (S.D. Fla. 2002) (dismissing amici's federal claims for just compensation "because plaintiffs have failed to exhaust their state remedies").

Accordingly, for themselves and their fellow property owners around the country, amici file this brief to explain that *Williamson County*'s state procedures requirement was wrong in its inception and is wrong today. As such, it ought to be scrapped in its entirety.

Amici's counsel represented the petitioner in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and he has filed numerous briefs in takings cases in this Court and in the lower courts, both federal and state.[1]

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution for the preparation or submission of this brief.

INTRODUCTION

This Court granted certiorari to consider a particular matter (issue preclusion) arising from *Williamson County*'s mandate that a property owner "ripen [its] federal Takings claim" in state court before litigating that claim in federal court. Pet. for Cert. at i. Amici curiae respectfully submit that consideration of this issue is like rearranging the deck chairs on a legal *Titanic*. As explained at length herein, the "state procedures" requirement of *Williamson County* "was not correct when it was decided, and it is not correct today"; therefore, the requirement "ought not to remain as binding precedent." *Lawrence v. Texas*, 539 U.S. 558, 578 (2004). In a word, it should be *overruled*.

Amici acknowledge that the Court rarely overrules a prior decision without full briefing of that point by the parties. But as set forth in Part II of the Argument below, the state procedures requirement was not one of the questions presented in *Williamson County*, and so that requirement was fabricated without any serious briefing or argument. Accordingly, it is not surprising that the state procedures requirement deviated sharply from the established understanding of the Just Compensation Clause and that it has generated massive doctrinal incoherence. No subsequent decision of this Court has defended the state procedures requirement, and virtually no one in the academy will defend it either as a theoretical matter. And for good reason—the requirement is indefensible, a jurisprudential embarrassment that ought to be discarded as soon as possible.

As the Court has repeatedly stated, when "governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." *Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Therefore, now is the time to overrule the unworkable and badly reasoned state procedures requirement of *Williamson County*.

SUMMARY OF ARGUMENT

1. It is important to comprehend the precise federal right at issue in cases within the sweep of the state procedures requirement. The property owner in such cases sues to enforce a right to recover just compensation for a taking. That right, and the corresponding obligation of the government to pay just compensation, was always understood to accrue or arise at the time of the taking, and not later. In asserting that the right and the obligation accrued at some later point after the denial of state-law remedies in a state court, *Williamson County* deviated sharply from the established understanding of the Just Compensation Clause.

2. The state procedures requirement was not one of the questions presented in *Williamson County*, and so it received only the most cursory treatment in the briefing and argument. Not surprisingly, therefore, the requirement is poorly reasoned. It rests principally on two flawed analogies to inapposite decisions that decree the unavailability of (1) equitable relief against compensable takings, and of (2) relief under the Due Process Clause for random and unauthorized deprivations of property, neither of which is remotely at issue. Nor can the requirement be justified by the principle that the Fifth Amendment proscribes only takings *without just compensation*, which supports a no-equitable-relief rule but not exhaustion of state judicial remedies.

3. The state procedures requirement has other defects that show its doctrinal incoherence. Among these are that the requirement is really an exhaustion mandate that conflicts with the no-exhaustion-of-remedies rule governing other federal rights, as twice recognized in bills passed by the House of Representatives. In addition, the requirement is in practice ignored by state courts (and by this Court in cases originating from state courts), even though it logically should apply in those fora. Finally, though touted as promoting local decisionmaking, the requirement affirmatively invites *dis*respect for state courts by treating them as mere stations on the road to federal court.

ARGUMENT

For the following reasons, the Court should overrule the state procedures requirement fabricated in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985).

I. In Creating the State Procedures Requirement, *Williamson County* Deviated Sharply from the Established Understanding of the Just Compensation Clause.

The question presented focuses on the preclusive effect vel non of the "state court proceeding that was required to ripen [petitioners'] federal Takings claim." Pet. for Cert. at i. That petitioners had to "ripen" that claim by proceeding in state court is, of course, a consequence of this Court's decision in *Williamson County*. The "state procedures" requirement of that decision—so called to distinguish it from the "final decision" requirement, which is not at issue here —decreed that a property owner must "seek compensation through the [state-law] procedures the State has provided for doing so" before presenting to a federal court a federal claim for just compensation. 473 U.S. at 194.

A. At Issue Here Is the Right to Recover Just Compensation for Takings of Private Property for Public Use.

In fabricating the state procedures requirement, the *Williamson County* opinion referred to a property owner's claiming or suffering "a violation of the Just Compensation Clause." 472 U.S. at 194-95; *accord id.* at 195 n.13 (referring to a "constitutional violation" stemming from a taking). While it is not unusual to use the term *violation* in a loose sense in connection with a claim for just compensation, this terminology obscures the true "nature of the constitutional right" at issue. *Id.* Property owners who seek just compensation in court under the Fifth Amendment are not claiming "constitutional violations" in the sense that they sue to enjoin or remedy state action that violates or transgresses

constitutional norms.[2] Rather, as the Court articulated in *First English Evangelical Lutheran Church v. County of Los Angeles*, these property owners sue to enforce the government's "constitutional obligation to pay just compensation" along with their corresponding "right to recover just compensation." 482 U.S. 304, 315 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960), and *Jacobs v. United States*, 290 U.S. 13, 16 (1933)). Thus, the owners are pursuing a monetary remedy that is "grounded in the Constitution itself." *Id.* at 315; *accord id.* at 316 ("the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution").[3]

B. It Was Always the Law That the Right to Recover Just Compensation Accrues at the Time of the Taking.

When does the government's constitutional obligation to pay just compensation arise? Or, to ask the same thing, when does a property owner's claim for just compensation accrue? The answer is that the taking, the obligation of the taker to pay just compensation, and the owner's claim for compensation come into being simultaneously, as this Court and the lower federal courts consistently held for decades prior to *Williamson County*. This Court has explained:

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[2] In certain circumstances, of course, one may allege a "violation" of the Takings Clause and ask a court's aid in enjoining that violation. A typical example is the allegation that a statute effects an uncompensated taking and that just compensation is not even potentially available. *See, e.g., Eastern Enterprises v. Apfel*, 524 U.S. 498, 538 (1998) (plurality opinion) (concluding that "the Coal Act's allocation of liability to Eastern violates the Takings Clause, and that [the statute] should be enjoined as applied to Eastern").

[3] A three-Justice plurality in *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 710 (1999), suggested that the property owner "sought not just compensation *per se* but rather damages for the unconstitutional denial of such compensation." Yet the plurality's analysis did not turn on the distinction between that view and a view of the case "as a simple suit for just compensation." *Id.*

> When a taking occurs by physical invasion, . . . the usual rule is that the time of the invasion constitutes the act of taking, and "[it] is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued . . . ."

United States v. Clarke, 445 U.S. 253, 258 (1980) (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958)).

Numerous decisions of this Court state essentially the same rule using slightly different phraseology. In *United States v. Dickinson*, 331 U.S. 745 (1947), the Court rejected the government's argument that Dickinson's reclamation of a portion of property previously taken by flooding rendered him ineligible to be paid for the original taking: "[N]o use to which Dickinson could subsequently put the property by his reclamation efforts changed the fact that the land was taken when it was taken and *an obligation to pay for it then arose*." *Id.* at 751 (emphasis added). In *Soriano v. United States*, 352 U.S. 270, 275 (1957), the Court affirmed as time-barred the dismissal of petitioner's claim against the government "for just compensation for supplies . . . taken from him . . . during the Japanese occupation of the Philippines." As it rejected petitioner's argument that the hostilities tolled the applicable statute of limitations, the Court agreed that petitioner's compensation claim "accrued at the time of the taking." *Id.*; *accord United States v. Rogers*, 255 U.S. 163, 169 (1921) ("Having taken the lands of the [claimants], it was the duty of the government to make just compensation as of the time when the owners were deprived of their property."); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923) (same).[4]

[4] The law in the Court of Appeals for the Federal Circuit and the old Court of Claims is the same. *See Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) ("A claimant under the Fifth Amendment must show that the United States, by some specific action, took a private property interest for a public use without just compensation. Therefore, a claim under the Fifth Amendment accrues when that taking action occurs."); *Inupiat Community of Arctic Slope v. United States*, 680 F.2d 122, 127 (Ct. Cl.) (holding that because the "alleged act of taking was the Settlement Act, the takings claims "accrued on . . . the date on which the Settlement Act became effective"), *cert. denied*, 459 U.S. 969 (1982); *Steel Improvement & Forge Co. v. United States*, 355 F.2d 627, 631 (Ct. Cl. 1966) ("It is axiomatic that a cause of action for an unconstitutional taking accrues at the time the taking occurs."); *Stafford Ordinance Corp. v. United States*, 108 F. Supp. 378, 381 (Ct. Cl. 1952) (holding that a "claim accrues in requisitioning property at the time of the actual taking of the property.").

The foregoing cases involved physical takings rather than regulatory takings, but that distinction makes no difference in this context. Thus, the Court of Appeals for the Federal Circuit applies the above-described rule to regulatory takings claims. *See Creppel v. United States*, 41 F.3d 627, 633 (Fed. Cir. 1994) (applying rule to a claim that the EPA effected a regulatory taking by blocking a reclamation project). Moreover, nothing in *Williamson County*'s discussion of state procedures hinges on the physical/regulatory distinction: the opinion purports to rest on "the nature of the constitutional right" in general, 473 U.S. at 195 n.13, not the nature of a specifically *regulatory* taking. *See, e.g., Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 958 & n.28 (7th Cir. 2004) (applying the state procedures requirement to physical takings, in accord with other courts of appeals).

In any event, the limited discussion in this Court regarding the accrual of regulatory takings claims confirms the coincidence of taking and duty to pay compensation. In *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 623 (1981), the Court ruled that it lacked jurisdiction to address the question presented—whether "a State must provide a monetary remedy to a landowner whose property allegedly has been 'taken' by a regulatory ordinance." But writing for four Justices—and commanding the substantial agreement of a fifth, *see id.* at 633-34 (Rehnquist, J., concur-

ring)—Justice Brennan would have reached that question and answered it in the affirmative, *see id.* at 653-60 (Brennan, J., dissenting). His analysis was grounded in part on the recognition that "[a]s soon as private property has been taken, . . . 'the self-executing character of the constitutional provision with respect to just compensation' is triggered." *Id.* at 654 (quoting *Clarke*, 445 U.S. at 257). When Justice Brennan's dissent later became law in *First English*, and the Court expressly reaffirmed "the self-executing character of the constitutional provision with respect to just compensation," 482 U.S. at 315, the Court necessarily reaffirmed as well that this constitutional provision is triggered "[a]s soon as private property has been taken."

In short, it was the consistent rule of this Court and the lower federal courts for many decades that the constitutional obligation to pay just compensation arises, and the claim for just compensation accrues, at the time of the taking. Whether stated that the event of taking "gives rise to the claim for compensation," *Dow*, 357 U.S. at 22; *Clarke*, 445 U.S. at 258, or that the obligation to pay just compensation is triggered "[a]s soon as private property has been taken," *San Diego Gas*, 450 U.S. at 654 (Brennan, J., dissenting), the rule was well-established. In asserting that a property owner's monetary claim under the Just Compensation Clause does not accrue "until just compensation has been denied" by the state judicial system, 473 U.S. at 195 n.13, *Williamson County* deviated sharply from the traditional understanding of that Clause.

II. In Creating the State Procedures Requirement, *Williamson County* Built a House on Jurisprudential Sand.

Did such a sharp deviation from decades of consistent constitutional interpretation come after sustained reflection in the face of compelling new authority? Was the state procedures requirement forged in the fires of intensive and extensive doctrinal reassessment in light of developments in

the law of just compensation? In a word, ***no***. In fact, quite the opposite: as explained below, the requirement was fabricated without benefit of serious briefing or argument, and it rests principally on flawed analogies to inapposite cases, as well as other misreadings of precedent.

A. The Requirement Was Fabricated Without Benefit of Serious Briefing or Argument.

In the Court's own words, it granted certiorari in the *Williamson County* case to decide "whether Federal, State, and Local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations." 473 U.S. at 185. The attorneys general of 19 states and territories, together with the Solicitor General of the United States, the National Association of Counties, the City of New York, and the City of St. Petersburg, Florida, joined the petitioner in urging the Court to reverse the court of appeals' judgment in favor of the property owner on two alternative grounds: "that a *temporary* regulatory interference with an investor's profit expectation does not constitute a 'taking,'" and "that even if such interference does constitute a taking, the Just Compensation Clause does not require *money damages* as recompense." *Id.* at 175 (emphases added). Four professional and public-interest organizations filed amicus curiae briefs urging affirmance of the judgment. *See id.* at 174.

In the end, all of this briefing was for naught, because the Court did not decide the questions presented. Instead, *Williamson County* left the temporary takings issue "for another day," as it concluded that the property owner's claim for just compensation was "premature." *Id.* at 186; *cf. First English*, 482 U.S. at 310 (deciding the issue after observing that *Williamson County*, among other cases, had left it undecided). The conclusion that the just compensation claim was premature rested primarily on the Court's applying the rule that a regulatory takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application

of the regulations to the property at issue." *Id.*; *see also id.* at 186-94 (explicating this "final decision" requirement).

Logically, the opinion could have stopped at that point, but it did not. Instead, the opinion put forth a "second reason [why] the taking[s] claim is not yet ripe," namely, that the property owner "did not seek compensation through the procedures the State has provided for doing so." *Id.* at 194. Of the twelve merits briefs filed in *Williamson County*, only the Solicitor General's amicus brief—and only in a single paragraph in its *Summary* of Argument—argued for anything approaching this "second reason." *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 10; *see also* Brief for Respondent at 39 (responding to point in two short paragraphs). Furthermore, although the "state procedures" issue did arise very briefly at oral argument in *Williamson County*, the Solicitor General's representative refused even to give an unequivocal answer to the question whether "a property owner would have to follow judicial review remedies as well for [regulatory action] to ripen into a taking." 1985 U.S. TRANS LEXIS 76, at *25-26 (Feb. 19, 1985); *see also id.* at *26 ("I think it tends to blend in with the question of whether there should be abstention on the state law question of whether the commission had properly applied state law.").

B. The Requirement Rests Principally on Two Flawed Analogies to Inapposite Decisions.

There are very good reasons why the Court "ordinarily do[es] not consider questions outside those presented in the petition for certiorari," and why the Court disregards that rule "only in the most exceptional cases." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). The "state procedures" aspect of *Williamson County* is a perfect illustration of such reasons. Given that the questions presented did not even touch on state judicial remedies and that the matter did not receive serious briefing or argument, it is no surprise that the fabrication of the state procedures requirement rested principally on two flawed analogies to inapposite decisions.

1. *Ruckelshaus v. Monsanto Co.*

First, the opinion cited *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-20 (1984), for the notion that "takings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." 473 U.S. at 195. From this notion, the opinion purported to draw an analogy: "Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." Granting that the analogy is not wholly implausible, the premise is wholly bogus. If "takings claims" are meant in this passage to refer to monetary claims for just compensation for completed takings of private property—the very claim that the property owner asserted in *Williamson County*—then the cited passage in *Monsanto* did not even consider such claims, let alone declare them "premature" until after the property owner had sued the United States under the Tucker Act.[5]

In *Monsanto*, a company sued in federal district court "seeking *injunctive and declaratory relief* from the operation of" various provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), alleging that "all of the challenged provisions effected a 'taking' of property without just compensation, in violation of the Fifth Amendment." 467 U.S. at 998-99 (emphasis added). Having concluded that some of the challenged provisions might conceivably operate to take the company's property in some circumstances, the Court proceeded to consider (in the passage later cited by

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[5] The Tucker Act grants subject matter jurisdiction to the Court of Federal Claims to hear "any claim against the United States founded upon . . . the Constitution." 28 U.S.C. § 1491(a)(1). This grant authorizes the Court of Federal Claims to adjudicate monetary claims against the United States for just compensation. *See, e.g., United States v. Causby*, 328 U.S. 256, 267 (1946) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to determine.").

Williamson County) whether that conclusion supported the requested injunctive relief. *Monsanto* ruled that it did not, based on the established rule that "[e]*quitable relief* is not available to enjoin an alleged taking of private property for public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking." *Id.* at 1016 (emphasis added); *see also id.* at 1017-19 (concluding that such a suit could be brought under the Tucker Act). Thus, the company's request for equitable relief under the Fifth Amendment was not merely *premature*, it was *not available* at all. In other words, there was nothing the company could do to "ripen" its claim for equitable relief; that claim simply had no merit, period.

What about a Tucker Act suit against the government in the Court of Federal Claims? Could such a suit be called a *prerequisite* to asserting a *monetary* claim against the government for just compensation for a taking of property? No, as the *Monsanto* decision confirms, a Tucker Act suit ***is*** the assertion of a claim for just compensation: "whatever taking may occur is one for public use, and a Tucker Act remedy is available to provide Monsanto with just compensation." *Id.* at 1020; *accord supra* note 5. So if *Williamson County* were correct that a property owner must "avail[] itself of the process provided by the Tucker Act" *before* pursuing its claim for just compensation, 473 U.S. at 195, then it would be the rule that a property owner must essentially bring a Tucker Act suit before bringing a Tucker Act suit. In other words, an owner's Tucker Act suit for just compensation would be "premature" until the property owner had brought a Tucker Act suit for just compensation. *Id.* Obviously, this *reductio ad absurdum* deserves no respect, and *Monsanto* provides no reasoned basis for the state procedures requirement.[6]

[6] Although the no-equitable-relief rule could be applied to claims against state and local governments, it has no relevance for the state procedures aspect of *Williamson County*, which makes property owners "seek *compensation* through the procedures the State has provided for doing so." 473 U.S. at 194 (emphasis added).

2. *Parratt v. Taylor*

The fabrication of the state procedures requirement in *Williamson County* also rested on the supposed analogy between takings of private property "without just compensation" and deprivations of property "without due process of law." The Court relied on *Parratt v. Taylor*, 451 U.S. 527 (1981), which it described as having "ruled that a person deprived of property through a random and unauthorized act by a state employee does not state a claim under the Due Process Clause merely by alleging the deprivation of property." 473 U.S. at 195. In such circumstances, "the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.'" *Id.* (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)). Then, another purported analogy: "Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not 'complete' until the State fails to provide adequate compensation for the taking." *Id.*

This analogy has two fatal flaws.[7] First, it provides no support for the go-first-to-state-court requirement actually imposed by the second prong of *Williamson County*. When a state does indeed "provide an adequate postdeprivation remedy for the property loss" as contemplated by *Parratt*, the deprived property owner does not pursue that state-law remedy *before* suing in federal court under the Due Process

[7] One should really say two fatal flaws in addition to the one that the Court itself acknowledged: "The analogy to *Parratt* is imperfect because *Parratt* does not extend to situations . . . in which the deprivation of property is effected pursuant to an established state policy or procedure." 473 U.S. at 195 n.14. By definition, a taking is *always* effected pursuant to an established state policy or procedure, for if the relevant injury to property results from a truly "random and unauthorized act by a state employee," the property owner has suffered a tort, not a taking.

Clause: To the contrary, the property owner must pursue the state-law remedy *instead of* suing in federal court. As *Williamson County* put it, the owner who has such a remedy categorically "does not state a claim under the Due Process Clause." 473 U.S. at 195. If the analogy with the Just Compensation Clause were valid, the property owner having a state-law remedy for just compensation categorically could not state a claim under the Just Compensation Clause *in any court*. Obviously, no one believes that, then or now.

Second, and more important, the specific notion that "the State's action [in respect to a taking] is not 'complete' until the State fails to provide adequate compensation for the taking," *id.*, is flatly contrary to the Court's sustained and reasoned consideration of the matter in *First English*. There, the Court held that the government's taking of property, without more, gives rise to an "obligation to pay just compensation" on the part of the government, and a corresponding "right to recover just compensation" on the part of the owner. 482 U.S. at 315. While a postdeprivation remedy might allow the government to escape liability for a denial of procedural due process (as in *Parratt*), once a taking has occurred, governmental liability for just compensation is inescapable: "*no subsequent action* by the government can relieve it of the duty to provide compensation." *Id.* at 321 (emphasis added). This formulation has continued to command the Court's assent. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 328 (2002) (quoting passage and opining that "nothing that we say today qualifies [that] holding" of *First English*).

C. The Requirement Finds No Support in the Principle That the Amendment Proscribes Only Takings *Without Just Compensation*.

Along with flawed analogies to *Monsanto* and *Parratt*, *Williamson County* relied on the uncontroversial principle that the "Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." 473 U.S. at 194. Indeed, this principle was so significant

that the opinion both reiterated and emphasized the point: "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied." *Id.* at 195 n.13.

Both of these propositions are quite true; both are also quite irrelevant to whether property owners must seek just compensation in state court under state law. As explained in Part I.A above (pp. 4-5), property owners who seek just compensation under the Fifth Amendment are neither seeking to "proscribe" (i.e., enjoin) takings nor asserting "constitutional violations." Instead, they are asserting a federal "right to recover just compensation," the monetary remedy that is "grounded in the Constitution itself."[8]

To put the point another way, the principle that the Fifth Amendment proscribes (only) those takings that are without just compensation leads not to the state procedures requirement but rather to the rule (reiterated in *Monsanto*) that "[e]quitable relief is not available to enjoin an alleged taking of private property for public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking." 467 U.S. at 1016, *discussed at supra* note 6 and accompanying text. That is, the "proscribes takings without just compensation" point cited by *Williamson County* is a fine basis for rebuffing property owners who ask federal courts to *enjoin state regulatory programs*; however, it is no basis at all for rebuffing property owners who ask federal courts to *award just compensation*.

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[8] *First English*, 482 U.S. at 315. There is no tension between *First English* and principle that the Fifth Amendment proscribes takings *without just compensation*. To the contrary, in the sentence immediately preceding the opinion's reiteration that takings trigger the "constitutional obligation to pay just compensation," *First English* emphasized that the Fifth Amendment "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." 482 U.S. at 315.

III. The State Procedures Requirement Has Other Defects that Show Its Doctrinal Incoherence.

If *Williamson County*'s state procedures requirement was not correct when it was decided, then it is also defective in additional ways that have come to light in the past two decades. Other amici have described many of these defects: the requirement is fundamentally unfair (the present case, for example, has consumed *twelve years* without a resolution on the merits, and amici began their own state-court actions nearly *ten years* ago); it is irreconcilable with *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997); and it spawns litigation about litigation instead of promoting resolution of federal constitutional claims on the merits. Two longtime and respected advocates in this Court have exhaustively catalogued the depths to which *Williamson County* has brought takings procedure. *See* Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here*, 36 URB. LAW. 672 (2004). In the following sections, amici discuss three other defects.

A. The Requirement Is Inconsistent with the No-Exhaustion-of-Remedies Rule Governing Other Federal Rights.

The intended effect of *Williamson County*'s state procedures requirement is to remit property owners with what had long been described as "accrued" *federal* claims for just compensation, *Soriano*, 352 U.S. at 275, to *state* courts to pursue remedies under *state* law. This result is anomalous on its face, and it is especially jarring in light of the Court's long-standing and firm refusal, with respect to *other* federal claims asserted pursuant to 42 U.S.C. § 1983, to "require[] exhaustion of state *judicial* . . . remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) (emphasis added), *quoted in Patsy v. Board of Regents*, 457 U.S. 496, 500 (1982). In practice, therefore, the state procedures requirement has effectively caused the Just Compensation Clause, "as much a part of

the Bill of Rights as the First Amendment or [the] Fourth Amendment, [to] be relegated to the status of a poor relation," notwithstanding the Court's protestations to the contrary in *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

The House of Representatives views the state procedures requirement as an "exhaustion" mechanism applying only to claims for just compensation, and has twice passed bills to eliminate it.[9] The House Judiciary Committee's report on the latter bill made clear that the non-exhaustion provision had as its target *Williamson County*'s state procedures requirement because the House viewed the requirement as a kind of exhaustion-of-judicial-remedies rule that was *rejected* in *Steffel*, *Patsy*, and many other decisions of this Court. *See* H.R. Rep. No. 106-518, at 13 & n.3 (2000). The committee report explained that the "combined effect of *Williamson County*, and the application of issue and claim preclusion [as presented in this case], is to drive out of Federal court virtually all Federal claims for just compensation for takings of private property by local governments." *Id.* at 13. As a result of the state procedures requirement, then, "property rights are procedurally disadvantaged compared to other civil rights." *Id.* (section heading).[10]

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[9] *See* Private Property Rights Implementation Act of 1997, H.R. 1534, 105th Cong., § 2 (adding 28 U.S.C. § 1343(e)(3) to provide that property owners seeking to enforce the Just Compensation Clause pursuant to 42 U.S.C. § 1983 need not "exhaust judicial remedies provided by any State or territory"); Private Property Rights Implementation Act of 2000, H.R. 2372, 106th Cong., § 2 (adding 28 U.S.C. § 1343(e)(4) to provide that claims for just compensation asserted pursuant to § 1983 are "ripe for adjudication even if the party seeking redress does not exhaust judicial remedies provided by any State or territory").

[10] If the present brief echoes the language of the cited committee report, that is because the report echoes the language of the Brief Amicus Curiae of Pacific Legal Foundation authored and filed by present amici's counsel in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999).

B. The Requirement Is in Practice Ignored by State Courts and by this Court.

If the state procedures requirement truly derives from the "nature" of the federal right to just compensation—as opposed to being merely a "procedural scheme under which claims may be heard in federal courts," *Patsy*, 457 U.S. at 501—then the requirement necessarily governs regardless of the judicial forum in which the federal right is asserted. That is, under the logic of *Williamson County*, "a property owner cannot claim a violation of the Just Compensation Clause" *even in state court* until it has used the "procedure for seeking just compensation" provided by the state. 473 U.S. at 195. In other words, no *federal* claim for just compensation may be presented to a *state* court unless and until the property owner has fully (and unsuccessfully) litigated his state-law claim for compensation (in the state judicial system).

This precept follows unassailably from the state procedures requirement; this precept is also uniformly ignored both by state courts themselves and by this Court. As for state courts, amici are aware of none that refuses to adjudicate *federal* claims for just compensation on the ground that they are premature until a property owner has pursued to completion all claims for compensation under *state* law. To the contrary, it is not difficult to cite numerous examples of state judicial systems that will hear and determine federal claims for just compensation *before* state-law compensation claims have been fully litigated.[11]

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[11] *See, e.g., Jacobs Wind Electric Co. v. Department of Transportation*, 626 So. 2d 1333, 1337 (Fla. 1993) (contemplating that a patent holder would assert its claims under the Just Compensation Clause *along with* its claims under the state analogue thereto and under state common law); *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851, 855 (Cal. 1997) (observing that the property owner brought a claim for "'just compensation' in the form of lost rental income and interest" under both "article I, section 19 of the California Constitution and the Fifth Amendment of the United States Constitution"), *cert. denied*, 522 U.S. 1077 (1998); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 930 (Tex. 1997) (finding ripe the plaintiff's "just compensation takings claims" brought at the same time "under the United States Constitution and Texas Constitution"); *Palazzolo v. State*, 746 A.2d 707, 711 (R.I. 2000) (observing that plaintiff "brought an inverse condemnation action" that asserted "a taking of his property for which he was entitled to compensation pursuant to the United States and Rhode Island Constitutions"), *aff'd in part, rev'd in part*, 533 U.S. 606 (2001).

As for this Court, consider the last two pure regulatory takings cases it has entertained on certiorari to state courts. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1009 (1992), the Court observed that following enactment of the relevant state statute, "Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation." Even though the Court postponed its discussion of the merits to address whether Lucas had satisfied *Williamson County*'s "final decision" requirement, *see id.* at 1010-14, the Court was not concerned in the least whether Lucas had also satisfied *Williamson County*'s "state procedures" requirement by litigating to completion whatever state-law claims for compensation he might have prior to asserting his federal claim for just compensation.

Likewise, in *Palazzolo v. Rhode Island*, 533 U.S. 606, 611 (2001), the Court observed that following proceedings before the state Coastal Resources Management Council, Palazzolo "sued in state court, asserting the Council's application of its wetlands regulations took the property without compensation in violation of the Takings Clause of the Fifth Amendment." Again, while the Court addressed the final decision requirement at length, *see id.* at 618-26, it gave no attention to the state procedures requirement. In contrast to *Williamson County*, the Court certainly did not go out of its way to assure itself that, *before* Palazzolo first asserted his federal claim for just compensation, he did indeed "seek

compensation through the procedures the State has provided for doing so."[12]

Amici point out these anomalies not to urge the state courts to be more eager in rebuffing federal takings claims on procedural grounds (or this Court to be more vigilant in exercising its certiorari jurisdiction) but rather to highlight the profound impact to state courts that would result from applying the state procedures requirement to the limits of its ineluctable logic. As explained in the following section, that impact also includes the fostering of an institutional disrespect for state courts.

C. The Requirement Invites Disrespect for State Courts by Treating Them as Mere Stations on the Road to Federal Court.

In a letter expressing its (unsuccessful) opposition to passage by the House of a bill eliminating the state procedures requirement, *see supra* note 9 and accompanying text, the Department of Justice cited "'a proper respect for State functions'" in arguing that "State courts are as capable as Federal courts in adjudicating local land use cases." H.R. Rep. No. 106-518, at 37, 42 (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)). These arguments naturally evoke the decisions of this Court that call for a "proper respect for the ability of state courts to resolve federal questions presented in state-court litigation." *Pennzoil Co. v. Texaco, Inc.*, 481

[12] In fact, neither Lucas nor Palazzolo litigated state-law claims to completion prior to asserting their federal claims. It is doubtful whether Lucas even asserted a state-law claim at all, the majority opinion of the South Carolina Supreme Court being devoid of any references to such a claim. *See Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991); *but cf. id.* at 907 (Hartwell, J., dissenting) ("Having determined that application of the Act constitutes a taking under the Constitution of the United States, it is not necessary to examine whether it constitutes a taking under the South Carolina Constitution."). Palazzolo did assert a state-law claim—*at the same very time as* he asserted his federal claim. *See Palazzolo v. State*, 746 A.2d 707, 711 (R.I. 2000).

U.S. 1, 14 (1987). Amici concur with the Department that this respect should influence the Court's thinking about the state procedures requirement. As set forth below, however, the requirement actually invites *dis*respect for state courts and their ability to resolve federal questions.

It has long been recognized that, notwithstanding "the paramount role Congress has assigned to the federal courts to protect constitutional rights," *Steffel*, 415 U.S. at 473, as a general matter "the state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States." *Grubb v. Public Utilities Commission*, 281 U.S. 470, 476 (1930); *accord, e.g., Tafflin v. Levitt*, 493 U.S. 455, 459 (1990). Monetary claims arising under the Just Compensation Clause are encompassed by this general rule, and state courts routinely adjudicate such federal claims against state and local governments. *See, e.g., Lucas*, 505 U.S. at 1010-32 (reviewing South Carolina courts' disposition of such claim); *Palazzolo*, 533 U.S. at 617-32 (reviewing Rhode Island courts' disposition of such claim).

Consider a procedural regime in which both the state courts and the lower federal courts adjudicate the federal claims for just compensation respectively presented to each. Property owners who agree with the Justice Department's prediction that "State courts are likely to be as sympathetic to local property owners as Federal courts," H.R. Rep. No. 106-518, at 37, will naturally gravitate toward the former; those who disagree, the latter. Each court system will develop federal takings law subject to this Court's review and, significantly, without interference from the other. Such a regime would not only yield more efficient decisionmaking, it would also truly show that "proper respect for ability of state courts to resolve federal questions presented in state-court litigation" enunciated in *Pennzoil Co.*, 481 U.S. at 14.

By contrast, consider the regime created by the state procedures requirement of *Williamson County*. Under that regime, federal courts consider state courts not as parallel

departments of a dual sovereign but rather as "hurdles" to be overcome on the road to resolution of claims by federal courts. *E.g., Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1165 (9th Cir. 1997), *cert. denied*, 525 U.S. 871, 921, 1018 (1998); *Eide v. Sarasota County*, 908 F.2d 716, 720-21 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). Moreover, federal courts send property owners packing off to state courts to litigate state-law claims they do not wish to pursue and to obtain rulings that may have absolutely no consequence in subsequent federal proceedings.[13] Forcing pointless detours to state courts to litigate sideshow issues demonstrates affirmative *dis*respect for those courts rather than the requisite proper respect.

CONCLUSION

As the Court recently reiterated, the doctrine of *stare decisis* is "not . . . an inexorable command." *Lawrence*, 539 U.S. at 577 (quoting *Payne*, 501 U.S. at 828). It is, instead, "a principle of policy" that must yield when the rationale of a prior decision "does not withstand careful analysis." *Id.* As this brief has shown, the state procedures requirement of *Williamson County* does not withstand such analysis: it was fashioned in circumstances that warrant no confidence its soundness, and "precedents before and after its issuance contradict its central holding." *Id.* Though state and local governments "rely" on it as a ready means to exhaust those

[13] *DLX, Inc. v. Kentucky*, 381 F.3d 511, 515-16 (6th Cir. 2004), is a very recently reported example. The property owner spent four years fulfilling the state procedures requirement in the Kentucky Circuit Court, the Kentucky Court of Appeals, and the Kentucky Supreme Court. *See Commonwealth v. DLX, Inc.*, 42 S.W.3d 624 (Ky. 2001). At the end of this marathon, the state courts denied compensation under state law based on "the operation of a state procedural rule without analogue in federal law," 381 F.3d at 520 —a ruling that advanced resolution of the owner's federal claim for just compensation not a single bit, *see id.* at 516-26.

property owners having temerity enough to assert federal claims for just compensation, "there has been no individual or societal reliance on [the state procedures requirement] of the sort that could counsel against overturning its holding once there are compelling reasons to do so." *Id.*

This last point is crucial, for we may expect a chorus from respondents and their amici about how the state procedures requirement is a pillar of Western Civilization and how overruling it will usher in a new Dark Ages. We think this chorus is largely driven by the desire of governments and their allies to narrow the substantive scope of regulatory takings law. Although that desire is understandable and, in the proper case, a legitimate litigating position, we trust that Members of this Court will resist the temptation to treat the state procedures requirement as a stand-in for disputing the substantive reach of the Just Compensation Clause. Whether that Clause affords broad relief to regulated property owners, narrow relief, or even no relief at all ought not to matter here: consistent with "the paramount role Congress has assigned to the federal courts to protect constitutional rights," *Steffel*, 415 U.S. at 473, the answers to that question should be resolved in federal court without requiring exhaustion of state-law remedies in state court.

For these reasons, the state procedures requirement of *Williamson County* should be overruled, and the judgment of the court of appeals should be reversed.

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Respectfully submitted,

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18

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IN THE

Supreme Court of the United States

SAN REMO HOTEL, L.P., *et al.*,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF NEW JERSEY, COLORADO, DELAWARE, HAWAII, MARYLAND, MISSOURI, MONTANA, OKLAHOMA AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Is a Fifth Amendment Takings claim barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT

1. THE FULL FAITH AND CREDIT ACT BARS RELITIGATION OF A TAKING CLAIM IN FEDERAL COURT WHERE THE STATE COURT ALREADY HAS ADJUDICATED THE SAME CLAIM 6

2. A RESERVATION OF RIGHTS UNDER ENGLAND DOES NOT ALLOW DUPLICATIVE LITIGATION IN FEDERAL COURT OF A TAKING CLAIM THAT HAS BEEN FULLY LITIGATED IN A STATE COURT, AND WHICH WOULD BE UNNECESSARILY BURDENSOME ON STATE AND LOCAL GOVERNMENTS AND BOTH COURT SYSTEMS 9

3. THE LOWER FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION TO REVIEW PETITIONERS' FEDERAL TAKING CLAIM 14

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

PAGE

Allen v. McCurry, 449 U.S. 90 (1980) 6, 7, 9, 10, 13, 19

Bianchi v. Rylaarsdam, 334 F.3d 895 (9th Cir. 2003) . . 17

Crutchfield v. Countrywide Home Loans, 389 F.3d 1144 (10th Cir. 2004) 17

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 1, 12, 16, 17

Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995) 8

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 3, 4, 9, 10,11, 12

FERC v. Mississippi, 456 U.S. 742 (1982) 14

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 12, 18

Frederiksen v. City of Lockport, 384 F.3d 437 (7th Cir. 2004) 17

Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996) 11

Howard v. Whitbeck, 382 F.3d 633 (6th Cir. 2004) . . . 17

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 18

Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) 18

Metzger v. Village of Cedar Creek, 370 F.3d 822 (8th Cir. 2004) 17

Migra v. Warren City School District Board of Ed., 465 U.S. 75 (1984) 7, 10, 19

Moccio v. New York State Office of Court Admin., 95 F.3d 195 (2d Cir. 1996) 17

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) . 9

Peduto v. City of N. Wildwood, 878 F.2d 725 (3d Cir. 1989) 13

Penn Central Trans. Co. v. New York City, 438 U.S. 104 (1978) 1, 4

Printz v. United States, 521 U.S. 898 (1997) 8

Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941) 4, 10

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 1, 12, 16, 17

San Remo Hotel v. City and County of San Francisco, 27 Cal.4th 643 (2002) 2, 8, 14, 15

San Remo Hotel v. San Francisco City and County, 364 F.3d 1088 (2004) 2, 9, 14

Santini v. Connecticut Haz. Waste Mgmt. Serv., 342 F.3d 118 (2d Cir. 2003) 13, 18

Sprint Spectrum, L.P. v Carmel, 361 F.3d 998 (7th Cir. 2004) 17

Stone v. Powell, 428 U.S. 465 (1976) 18

Testa v. Katt, 330 U.S. 386 (1947) 8

Walker v. Horn, 385 F.3d 321 (3d Cir. 2004) 17

Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 11, 12, 13, 14, 15, 17

Woodward-Clyde Consult. v. Chemical and Pollution Sciences, Inc., 105 N.J. 464 (1987) 9, 14

Younger v. Harris, 401 U.S. 37 (1971) 6

UNITED STATES CONSTITUTION

Full Faith and Credit Clause, Article IV, §1 1

Supremacy Clause, Article VI, Cl.2 . . . . . 8, 9

Fifth Amendment 4, 8, 14, 15, 18

Eleventh Amendment 14

Fourteenth Amendment 10, 14, 18

STATUTES

28 U.S.C. § 1257 16

28 U.S.C. §1738 . . . . . 1, 3, 5, 6 7, 8, 10, 13

42 U.S.C. §1983 7

FEDERAL RULES OF CIVIL PROCEDURE

F.R.Civ.P. 12(b)(1) 17

F.R.Civ.P. 59 11

LAW REVIEW ARTICLES

Roberts, Thomas E., "Procedural Implications of Williamson County/First English in Regulatory Takings Litigation; Reservations, Removal, Diversity, Supplemental Jurisdiction, Rooker-Feldman, and Res Judicata," 31 ELR 10353, 10354 (Apr. 2001) 12

Sterk, Stewart R., "The Federalist Dimension of Regulatory Takings Jurisprudence," 114 Yale L.J. 203, Nov. 2004 8

INTEREST OF AMICI CURIAE

The States have a critical, constitutional interest in upholding our federal system, as embodied in the Full Faith and Credit Clause, Art. IV, §1, of the United States Constitution, enacted through the Full Faith and Credit Act, 28 U.S.C. §1738. A federal court should apply the Full Faith and Credit Act to preclude relitigation of a regulatory takings claim after a state court has issued a final judgment on the merits of the identical issues, if the state law is at least as protective of constitutionally recognized property rights as federal law. This is particularly critical in states whose laws prohibit claim splitting. Petitioners' contrary argument would encourage duplicative relitigation of issues already decided in the state courts, establishing the federal courts as courts of review over the state courts, contrary to constitutional principles and in violation of the Rooker-Feldman doctrine and principles of *res judicata* and collateral estoppel. The lower federal courts lack subject matter jurisdiction to review the final judgment of a state court.

Taking claims involve a very labor-intensive and fact-sensitive inquiry, as required by Penn Central and its progeny. Duplicative litigation of compensation issues that already have been litigated in the state courts would place upon State and local governments a tremendous financial burden that would contradict our federal system and could obstruct the fundamental ability of local and state governments to make decisions regarding local land use concerns.

The petitioners' theory, if adopted by this Court, would undermine the Full Faith and Credit Act and the federalism principles it represents, forcing government entities into duplicative relitigation of issues already decided in the State courts. This action also concerns State *amici* because the case below involves petitioners' second federal

court filing of issues and claims that already were litigated in both federal and state court, as well as forum shopping tactics that already have consumed inordinate public resources.

STATEMENT OF THE CASE

State *amici* rely upon the statement of procedure and facts set forth by the California Supreme Court in San Remo Hotel v. City and County of San Francisco, 27 Cal.4th 643 (2002), and the additional procedure and facts set forth by the Ninth Circuit Court of Appeals in San Remo Hotel v. San Francisco City and County, 364 F.3d 1088 (2004).

Despite voluntarily filing the first action in federal court, in their 1997 initial appeal to the Ninth Circuit, 145 F.3d 1095, petitioners argued for the first time that, after all, the district court should not have decided the taking claim but instead should have abstained until resolution of a state court litigation. The Ninth Circuit abstained to allow the state courts to decide whether the hotel was residential or commercial, under the San Francisco ordinance. The Ninth Circuit did not direct or expect petitioners to litigate their takings claim, under federal or state law, in the state court. After litigating the same issues unsuccessfully in the state courts, up to and including the California Supreme Court, petitioners brought their taking claim back again to the federal court based upon the very same facts. The district court dismissed petitioners' claims as time-barred but indicated that, if it were to rule on the merits, it would find in favor of San Francisco. Petitioners then appealed to the Ninth Circuit for a second time in 2004, 364 F.3d 1088. The Ninth Circuit noted that California state takings law is equivalent to federal takings law, and affirmed under principles of issue preclusion.

SUMMARY OF THE ARGUMENT

The Full Faith and Credit Act bars relitigation of a regulatory taking claim in federal court where a competent state court already has adjudicated the state and federal claims. Principles of federalism, as well as principles of *res judicata* and collateral estoppel, preclude a duplicative collateral attack upon the final decision of a state court, which under these circumstances, is not a right recognized under England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). As long and repeatedly noted by this Court, state courts are perfectly capable of adequately addressing and protecting rights guaranteed under federal law.

Relitigating regulatory taking claims in federal court, where the state court allows litigation of the federal claim or where the claimant litigates its compensation claim under state law standards that are equivalent to federal law standards, would be both prohibitively burdensome upon State resources and would infringe improperly upon the sovereignty of the States. All issues that were or could have been litigated in state court should be binding upon the claimant. Moreover, a federal-law based taking claim that was litigated under state law, which is at least as protective of constitutionally recognized rights as federal law, should preclude relitigation of the same claim in federal court. If state law prohibits claim splitting, the federal courts must accord the judgments of those state courts the same preclusive effect as judgment s of the federal courts. State *amici* respectfully ask the Court to affirm the judgment below and its holding that an England reservation does not allow relitigation of a taking claim that already has been fully litigated in State court under equivalent legal standards.

Once a state court of competent jurisdiction has

reviewed and ruled upon a federal claim, the lower federal courts lack subject matter jurisdiction over that claim. Moreover, a reservation of rights under England is not effective when the federal court does not have jurisdiction, as in the case of an unripe claim, or in the absence of a Pullman reservation. In any event, England does not change the subject matter jurisdiction of the lower federal courts. Accordingly, an England reservation will not allow duplicative litigation in federal court of a taking claim that has been fully litigated in a state court.

This Court has consistently ruled that adjudication of a regulatory taking claim involves an *ad hoc* factual analysis. Penn Central Trans. Co. v. New York City, 438 U.S. 104, 124 (1978). Thus, litigating a federal-law based taking claim requires intensive discovery, often including multiple depositions, voluminous document production and review; preparing, analyzing and revising land use plans; preparing expert reports and taking expert testimony on the conditions of and uses for a property; and preparing and analyzing appraisals of property values. The same discovery is required to litigate a state-law based inverse condemnation claim. Due to their obligations under the Fifth Amendment, the state courts must be at least as protective of constitutionally recognized rights when litigating a claim for compensation under state law as they must when litigating a taking claim under federal law, and as a federal court must when litigating a taking claim.

The determination by a state court under state law of whether a claimant is entitled to compensation as a result of a regulatory activity should entirely resolve all issues material to the federal law taking claim. Otherwise, the federal court will require either the duplication of a typically very lengthy and labor-intensive litigation, or the filing of summary

judgment motions under federal law that will apply standards equivalent to the state court's decision under state law. The exercise of completely relitigating the case in federal court is time-consuming and expensive; to do so more than once would be both oppressive and legally groundless. The alternative of inviting a federal court ruling applying the equivalent legal standard merely invites inconsistent rulings by the state and federal trial courts, an outcome that the Full Faith and Credit Act prohibits.

The course argued by petitioners would intimidate local and state governments with the specter of endless litigation of claims that already have been fully litigated in a state court under substantively identical law. Ultimately, petitioners would impose further burdens on the tax-paying citizenry. Citizens would bear the burdens of either paying to repeatedly defend the regulatory actions of their state and local governments, after their state courts had found them constitutional by applying a federally equivalent legal review, or enduring the diminution of the power of their own elected government to decide appropriate land uses in their communities. Our federalist system prohibits such duplicative litigation and intrusion into state sovereignty.

ARGUMENT

1. THE FULL FAITH AND CREDIT ACT BARS RELITIGATION OF A TAKING CLAIM IN FEDERAL COURT WHERE THE STATE COURT ALREADY HAS ADJUDICATED THE SAME CLAIM UNDER EQUIVALENT LEGAL STANDARDS.

Federal courts must give preclusive effect to state-court judgments whenever courts of the State from which the judgments emerged would do so:

> [J]udicial proceedings [of any court of any State] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State ....

28 U.S.C. §1738; Allen v. McCurry, 449 U.S. 90, 95 (1980).

The federal courts have consistently accorded preclusive effect to state court judgments, because *res judicata* and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system. See Younger v. Harris, 401 U.S. 37, 43-45 (1971).

Thus, the Full Faith and Credit Act prohibits duplicative litigation of a matter already fully litigated in a state court under equivalent legal standards. The purpose of

the Full Faith and Credit Act is to further our federalist form of government. Application of the Act on the facts presented here is both fair and consistent with this Court's jurisprudence.

In Allen v. McCurry, this Court specifically found that "nothing in the language or legislative history of [42 U.S.C.] §1983 proves any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights." 449 U.S. at 103-104. This Court has extended Allen to find that it precludes the federal courts from considering any claim that could have been brought in state court but was not asserted there, applying the traditional doctrine of collateral estoppel. Migra v. Warren City School Dist. Board of Ed., 465 U.S. 75, 83-85 (1984). In Migra, this Court explained:

> Although [giving state-court judgments issue preclusive but not claim preclusive effect] may seem attractive from a plaintiff's perspective, it is not the system established by §1738. That statute embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources.

Id., 465 U.S. at 84.

Since the Fifth Amendment requires that litigation of a compensation claim in state court must be at least as protective of constitutionally recognized rights as federal law, the state court will determine the substance of the taking claim. Relitigating the legally equivalent claim in federal court would place form over substance, and would risk contradictory results based on essentially the same legal standard. See Dodd v. Hood River County, 59 F.3d 852, 863 (9th Cir. 1995) (collateral estoppel bars federal takings claim if state court's earlier decision on state law takings claim was "an equivalent determination under the federal taking clause"); see also Sterk, Stewart R., "The Federalist Dimension of Regulatory Takings Jurisprudence," 114 Yale L.J. 203, n.181, Nov. 2004. Thus, the California Supreme Court should not have allowed petitioners to "reserve," see San Remo Hotel, 27 Cal. 4th at 649 n. 1, any of the federal causes of action that could have been litigated in the California state courts.

This Court should affirm that the Full Faith and Credit Act prohibits the relitigation in federal court of state or federal claims that have been litigated, or could have been litigated, in the state courts. Under the Supremacy Clause, Art. VI, Cl.2, of the United States Constitution, state courts must apply federal law and respect governing federal precedent. This Court has held that state courts of appropriate jurisdiction must adjudicate federal claims whenever a federal statute requires them to do so. See Testa v. Katt, 330 U.S. 386 (1947). Moreover, under the Supremacy Clause, "state courts cannot refuse to apply federal law." See Printz v. United States, 521 U.S. 898, 928-929 (1997). The critical importance of the Full Faith and Credit Act to our federalist system is perhaps clearest in those state courts that expressly allow litigation of federal claims and also prohibit claim splitting, requiring each party to assert

any claim that can be litigated in that forum. See e.g., R. 4:30A (New Jersey entire controversy doctrine court rule); Woodward-Clyde Consult. v. Chemical and Pollution Sciences, Inc., 105 N.J. 464 (1987).

This Court has recognized that there is no basis to think that the state courts cannot properly apply federal law. U.S. Const., Art. VI, Cl. 2, see Allen, 449 U.S. at 105; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819). Of course, collateral estoppel will not apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the state court, Allen, 449 U.S. at 95, or when the state court did not apply "equivalent" law, San Remo 364 F.3d at 1096, 27 Cal.4th at 663-64, i.e. law that is at least as protective of constitutionally recognized rights as federal law. However, if a state court does not properly respect federal takings law, the recourse should be to seek review through *certiorari* to this Court, not to relitigate the claim in the federal district court.

2. A RESERVATION OF RIGHTS UNDER ENGLAND DOES NOT ALLOW DUPLICATIVE LITIGATION IN FEDERAL COURT OF A TAKING CLAIM THAT HAS BEEN FULLY LITIGATED IN A STATE COURT, AND WHICH WOULD BE UNNECESSARILY BURDENSOME ON STATE AND LOCAL GOVERNMENTS AND BOTH COURT SYSTEMS.

In England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), this Court neither recognized nor conferred the right to collaterally attack a final

decision of a State court of competent jurisdiction. In England, a three-judge panel abstained *sua sponte* under the doctrine in Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941), from considering Fourteenth Amendment due process and equal protection claims since their resolution depended upon an unsettled question of Louisiana state law.

This Court should not extend the England decision to takings cases. Rather, this Court should clearly reassert that, where a claim under federal law can be fully litigated in state court, then the circumstances that would justify an England reservation are not present and the Full Faith and Credit Act, and principles of federalism, *res judicata* and collateral estoppel, prohibit such duplicative and burdensome litigation.

This Court decided England before deciding, in Allen and Migra, that the Full Faith and Credit Act prohibits relitigation in federal court of an equivalent claim that has been fully and fairly litigated in state court under state law that meets the minimum standards of federal law. Full and fair litigation of a claim for compensation under state law, where the legal standard is at least as protective of constitutionally recognized rights as federal law, will resolve the substance of the federal-law taking claim as well. If the claimant has the opportunity to litigate all issues in state court, and can litigate its claims under equivalent legal standards, then no unresolved federal claim should remain. Thus, a claimant should not be allowed to pursue a "second bite at the apple" in federal court, with duplicative litigation or a legal determination under federal law of a claim that the state court has decided under substantively identical state law.

There is no reason to relitigate a taking claim in federal court after its complete litigation in a state court. As this Court recognized in England, duplicative litigation unnecessarily increases the length and cost of litigation and is a potential source of friction between the state and federal judiciaries. Duplicative litigation also can disrupt "the harmonious relation between state and federal authority," England, 375 U.S. at 421 n. 12, and can create "the possibility of unwarranted disruption of a state administrative process." Id. at 415 n. 5.

Moreover, petitioners essentially argue that they are entitled to a new trial, in federal court, whenever they obtain an adverse ruling in the state courts, or to split their claim and litigate a portion in each forum. Neither rationale comports with commonly accepted legal principles. "A new trial may be granted ... for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." F.R.Civ.P. 59. Those reasons usually include an erroneous weighing of facts or law that contradicts precedent, not a mere adverse ruling with which the claimant is dissatisfied. See id.; Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 467-468 (1996).

In Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), this Court held that if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation. This Court did not address the implications of a determination by the state court that, after considering the regulatory taking factors including the economic impact of the challenged action and the extent to which it interferes with reasonable investment-

backed expectations, the claimant is not entitled to compensation.

England must be read *in pari materia* with this Court's subsequent regulatory taking jurisprudence, particularly Williamson County, where this Court clarified that our system of federalism requires initial litigation of a regulatory taking claim in the State courts. The purpose of initiating litigation challenging an alleged taking in State courts is not merely to develop a factual record, but also to resolve the substantive legal dispute where legally possible. In the typical taking claim, that dispute involves the questions of whether a regulatory taking of property has occurred, and if so the claimant's entitlement to, and the amount of, compensation. See Williamson County, 473, U.S. at 195 and n. 14.

Williamson County did not expand the scope of federal review of State action or of State court decisions. Instead, the Williamson approach reflects the fact that planning, zoning and other local and State land use decisions are essentially local and that state courts should be afforded the opportunity to address their takings implications in the first instance.

Moreover, read together, Williamson County and First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987), require a state court to adjudicate a federal taking claim. See Roberts, Thomas E., "Procedural Implications of Williamson County/First English in Regulatory Takings Litigation: Reservations, Removal, Diversity, Supplemental Jurisdiction, Rooker-Feldman, and Res Judicata," 31 ELR 10353, 10354 (Apr. 2001). Whether a litigant's presence in state court is "voluntary" or not, the

state court has not only the power but also a mandate, to adjudicate any federal taking claim put before it, while litigating any state law claims.

This Court's Williamson County ripeness requirement does not create an actual Catch-22. See Contra Santini v. Connecticut Haz. Waste Mgmt. Serv., 342 F.3d 118, 127 (2d Cir. 2003), cert. denied, 125 S.Ct. 104 (2004). It is perfectly fair, and consistent with our federalist court system, for state courts to address federal issues in the takings context, with ultimate review by this Court. Suggestions to the contrary imply either that state courts improperly apply federal standards, or that every claimant has a *per se* right to litigate every federal claim in federal court. Both implications are incorrect. State trial court decisions are subject to review by the superior courts in each state, providing another level of review and protection of a clamant's rights; ultimately, of course, this Court sits as the final appellate court for decisions of the highest state courts.

The ripeness requirement of Williamson County is not a "procedural trap" as some courts have suggested, but an opportunity to promote comity by avoiding duplicative litigation where a state court may consider and resolve claims under state and federal law. See Allen v. McCurry, 449 U.S. at 96; Peduto v. City of N. Wildwood, 878 F.2d 725, 729 (3d Cir. 1989) (Williamson ripeness requirement is insufficient to preclude application of *res judicata* and collateral estoppel principles in this case). Consistent with our federalist system, the Full Faith and Credit Clause requires the federal courts to give claim preclusive effect to state laws that prohibit claim splitting. See Peduto, 878 F.2d at 727-28 & n.1&2; R. 4:30A (New Jersey entire controversy court rule prohibiting claim

splitting); Woodward-Clyde Consultants v. Chemical and Pollution Sciences, Inc., 105 N.J. 464 (1987). Moreover, state courts are the appropriate forum to adjudicate state and local land use decisions. "[R]egulation of land use [] is perhaps the quintessential state activity." FERC v. Mississippi, 456 U.S. 742, 767 n.30 (1982). The Eleventh Amendment also weighs against claimants litigating their federal taking claims against the States in federal court.

Thus, a claimant's litigating both state and federal claims in the state courts in the first instance is not only consistent with well-established legal principles, but is a desirable course. Under Williamson County, the state courts will have the initial opportunity to adjudicate the merits of the regulatory taking claim. If the state-law standards for compensation are equivalent to the federal-law taking standards, then all issues material to the taking claim will have been resolved in the state court litigation and there will be no need for this claim to advance to the federal court. The result of that adjudication is subject to review by the superior courts of that state and, if appropriate, by this Court.

3. THE LOWER FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION TO REVIEW PETITIONERS' FEDERAL TAKING CLAIM.

As set forth in more detail in the Statement of the Case, as well as in the decisions of the California Supreme Court in San Remo Hotel v. City and County of San Francisco, 27 Cal.4th 643 (2002) and the Ninth Circuit Court of Appeals in San Remo Hotel v. San Francisco City and County, 364 F.3d 1088 (2004), petitioners' as-applied and facial taking claims, arising under the Fifth and Fourteenth

Amendments to the United States Constitution ("federal taking claim" or "Just Compensation Clause claim"), were reviewed and ruled upon by a state court of competent jurisdiction.[1] Consequently, the district court and the Ninth Circuit lacked subject matter jurisdiction to adjudicate the claims.

The California Supreme Court in San Remo merely acknowledged that petitioners reserved their "substantially advances" claim for litigation in the federal court. However, the California courts were empowered to hear and review federal takings claims. Petitioners have suggested incorrectly, Brief for Petitioners at 9, that, in the ordinary course, the California state courts lack the ability to review the federal takings claims put before them, and that this Court may not review the taking decisions of the California Supreme Court. Petitioners rely upon Breneric Associates v. City of Del Mar, 81 Cal.Rptr.2d 324, 338-339 (Cal. Ct. App. 1998); however, Breneric did not make that far-reaching statement. Instead, Breneric reiterated the ripeness requirement of Williamson County while implicitly recognizing that a takings claimant could litigate a ripe federal taking claim in the California state courts. Id.

Once a state court of competent jurisdiction has reviewed and ruled under state law upon the issues that are material to a federal claim, the lower federal courts lack

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[1]This brief addresses only the question certified by the Court: "Is a Fifth Amendment takings claim barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal takings claim?" Further, Lingle v. Chevron, No. 04-163, now pending before the Court, may render unnecessary any decision on the substantially advance claim, to the extent it still exists in this case.

subject matter jurisdiction over that claim. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) and Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). Section 1257 of Title 28 of the United States Code vests federal appellate jurisdiction over judgments of the highest state courts in the United States Supreme Court. 28 U.S.C. § 1257. Only this Court exercises appellate jurisdiction over state courts. See Rooker, 263 U.S. at 416.

> Under the legislation of the Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment [of an Indiana circuit court that was subsequently affirmed by that state's highest court] for errors of [a federal constitutional] character. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.

Rooker, 263 U.S. at 416 (internal cites omitted); see also Feldman, 460 U.S. at 482 ("a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in this Court"). Moreover, as this Court has long held, the district courts also lack subject matter jurisdiction to review constitutional claims "inextricably intertwined" with the claims resolved by the state court. See Feldman, 460 U.S. at 483, n.16. An inferior federal court lacks subject matter jurisdiction over any claim that would essentially require it to "review the state- court decision." Feldman, 460 U.S. at 483 n.16.

Significantly, however, a federal taking claim arising

under the Just Compensation Clause of the United States Constitution is not ripe until the claim for compensation has been adjudicated in a state court. See Williamson County, 473 U.S. at 194-95. A district court confronted with such an unripe claim must dismiss it for lack of subject matter jurisdiction. See, e.g., Metzger v. Village of Cedar Creek, 370 F.3d 822, 823-24 (8th Cir. 2004) (affirming dismissal of claims unripe under Williamson for lack of subject matter jurisdiction pursuant to F.R.Civ.P. 12(b)(1)); Sprint Spectrum, L.P. v Carmel, 361 F.3d 998 (7th Cir 2004) (same).

Because "a challenge under the Rooker-Feldman doctrine is for lack of subject matter jurisdiction," see Moccio v. New York State Office of Court Admin., 95 F.3d 195, 198 (2d Cir. 1996),[2] there simply is nothing to "reserve" in federal court before a claim for compensation has been presented to and decided by a state court.

Subject matter jurisdiction does not exist in such a situation because the Just Compensation Clause imposes only

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[2]Accord Crutchfield v. Countrywide Home Loans, 389 F.3d 1144, 1148 (10th Cir. 2004) (lower federal courts lack subject matter jurisdiction to review an issue "actually decide[d] by a state court"); Frederiksen v. City of Lockport, 384 F.3d 437, 439 (7th Cir. 2004)("the right disposition, when the Rooker-Feldman doctrine applies, is an order under F.R.Civ.P. 12(b)(1) dismissing the suit for lack of subject matter jurisdiction"); Walker v. Horn, 385 F.3d 321, 329 (3d Cir. 2004) (same); Howard v. Whitbeck, 382 F.3d 633 638-29 (6th Cir. 2004) (Rooker-Feldman denies subject matter jurisdiction as to claims "arising directly from the state court's judgments, and those which allege an injury predating the state-court's judgments but which are still 'inextricably intertwined' with state-court judgments"); Bianchi v. Rylaarsdam, 334 F.3d 895, 898 (9th Cir. 2003) (Rooker-Feldman deprives lower federal courts of subject matter jurisdiction to preclude "second-guessing state court decisions"), cert. denied, 540 U.S. 1213 (2004).

a conditional limitation upon the states' police powers: a taking of private property is permissible as long as the government provides just compensation for such appropriated property. See First English, 482 U.S. at 314. Thus, unlike claims that could be presented in either state or federal court, see, e.g., Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) (employment discrimination claim litigated voluntarily in state court precluded subsequent litigation on same issue in federal court), the taking claimant must proceed in state court first as an element of its federal claim. A federal taking claim does not exist until that process is complete.

The Fifth Amendment has been held to be self-executing, enforceable through adjudication in the state courts. Thus, state inverse condemnation suits do not provide only the just compensation required under state law. Rather, such suits are a method of obtaining the just compensation required by the Fifth and Fourteenth Amendments. See First English, 482 U.S. at 315 (internal quotation omitted). Since state courts must adjudicate federal claims, see, e.g.,id.; Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 275-75 (1997); Stone v. Powell, 428 U.S. 465, 494 n. 35 (1976), but see Santini, 342 F.3d at 130 & n.7, the state court review necessary to determine the state law compensation claim and to ripen a federal Just Compensation Clause claim effectively resolves both claims and precludes review by a district court of either claim.

This is the alleged "Catch-22" in which litigants find themselves. See, e.g., Santini, 342 F.3d at 127. In fact, however, there is no Catch-22. A Catch-22 would exist only if litigants were otherwise entitled to federal court review of a claim arising under the federal Just Compensation Clause and were (wrongly) deprived of that opportunity. But,

contrary to the position urged by petitioners, there simply is no entitlement to federal court review of a federal constitutional claim. See Migra, 465 U.S. at 83-85; Allen, 449 U.S. at 103-104; see generally "The Federalist Dimension of Regulatory Takings Jurisprudence," 114 Yale L.J. 203.

In this case, it is undisputed that petitioners' takings claims "were fully litigated in the state court." 364 F.3d 1088; see also Brief for Petitioners at 8 ("the California courts rejected the Field Brothers' claims under state law"). As the district court properly held and the Ninth Circuit affirmed, "the substantive California takings law was coextensive with federal takings law." 364 F.3d at 1094; see also id. at 1096-1098. Moreover, petitioners' "facial and as-applied takings challenges raised in the state court are identical to the federal claims asserted by the plaintiffs, and are based on the same factual allegations." 364 F.3d at 1096. Because the claims were identical, the California courts correctly applied co-extensive state law to identical claims and the state court decision "was a final decision on the merits" in an action to which petitioners were a party, the inferior federal courts lack subject matter jurisdiction to conduct what would in essence be appellate review. All issues material to petitioners' state-law compensation claim and federal-law taking claim have been fully and fairly litigated under equivalent legal standards, and therefore have been resolved. There is no legal basis to relitigate the same claims in the district court.

CONCLUSION

The *amici curiae* States of New Jersey, Colorado, Delaware, Hawaii, Maryland, Missouri, Montana, Oklahoma and West Virginia respectfully ask that this Court affirm the holding below of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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(20)

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IN THE

Supreme Court of the United States

SAN REMO HOTEL, L.P., THOMAS FIELD, ROBERT FIELD, and T & R INVESTMENTS CORP.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is a Fifth Amendment takings claim barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal takings claim?

TABLE OF CONTENTS

		Page
QUESTION PRESENTED		i
TABLE OF CONTENTS		ii
TABLE OF CITED AUTHORITIES		iii
INTEREST OF AMICI CURIÆ		1
SUMMARY OF THE ARGUMENT		2
POINT I	THE FULL FAITH AND CREDIT ACT PROHIBITS PETITIONERS FROM RELITIGATING *DE NOVO* TAKINGS ISSUES THAT HAVE BEEN FULLY AND FAIRLY DECIDED BY STATE COURTS	3
POINT II	DUPLICATE TAKINGS TRIALS WOULD UNDULY BURDEN GOVERNMENTS AND COURTS, AND WOULD INHIBIT TIMELY AND EFFECTIVE LAND-USE PLANNING	12
CONCLUSION		19

TABLE OF CITED AUTHORITIES

Page

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252 A.D.2d 498 (2d Dep't 1998) 16

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(Sup. Ct., Suffolk County, 1997) 16

Brotherton v. Department of Environmental Conservation,
189 A.D.2d 814 (2d Dep't 1993) 16

Chevron v. Cayetano,
198 F. Supp. 2d 1182 (D. Haw. 2002) 14, 15

City of Monterey v. Del Monte Dunes at Monterey, Ltd.,
526 U.S. 687 (1999) 12, 13, 14

Claflin v. Houseman,
93 U.S. 130 (1876) 9

District of Columbia Court of Appeals v. Feldman,
460 U.S. 462 (1983) 8

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	Page
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	Page
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Lucido v. Superior Court, 795 P.2d 1223, 51 Cal. 3d 335 (1990)	5, 10
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Migra v. Warren City School District Board of Education, 465 U.S. 75 (1984)	10, 12
Palazzollo v. Rhode Island, 533 U.S. 606 (2001)	12
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Page

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21 F. Supp. 2d 179 (E.D.N.Y. 1998) 14

San Remo Hotel L.P. v. San Francisco City and County,
364 F.3d 1088 (9th Cir. 2004) 5, 6

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41 P.3d 87, 27 Cal. 4th 643 (2002) 4, 5

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342 F.3d 118 (2d Cir. 2003) 1, 6, 7, 10, 11

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34 F. Supp. 2d 1226 (D. Nev. 1999) 14

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473 U.S. 172 (1985) 6, 11

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220 F. Supp. 2d 140 (E.D.N.Y. 2002) 17

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Page

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46 Am. Jur. 2d *Judgments* §§ 539-552 (2004) 10

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INTEREST OF AMICI CURIAE

Amici States New York, Connecticut, and Vermont have two critical interests in this litigation. The first is the States' interest in their constitutionally-guaranteed status as independent sovereign entities, which would be undermined by the rule Petitioners advocate. Petitioners maintain that a decision by a State's highest court may be subjected to what is, in essence, appellate review by a United States district court. The Second Circuit recently reached just this conclusion in a decision that currently binds the Amici States, holding that takings plaintiffs may "reserve" federal claims for *de novo* consideration in federal court, irrespective of a final decision by state courts on issues essential to the cognate federal takings claim. *See Santini v. Conn. Haz. Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 104 (2004). This second "bite at the apple" that the Second Circuit permits, and which Petitioners now ask this Court to confirm, is contrary both to the Full Faith and Credit Act ("FFCA"), 28 U.S.C. § 1738, and to the underlying principles of our federal system. Amici States have a deep interest in preventing the erosion of "the comity between state and federal courts that has been recognized as a bulwark of the federal system," *Allen v. McCurry*, 449 U.S. 90, 96 (1980), and accordingly we strongly oppose the creation of the unwarranted exception to the FFCA advocated by Petitioners.

Second, it is the States and local governments that will bear the burden of the protracted and duplicative litigation that would result from Petitioners' proposed rule. This Court's cases correctly require courts faced with takings claims to engage in highly-detailed, fact-sensitive inquiries, a process that imposes significant costs on parties. Further burdening state and local governments with duplicative

litigation of such issues would compromise their ability to address in a timely and effective manner local land-use concerns, as the tortured path of this litigation demonstrates. Such a rule would severely hamper state and municipal efforts to "regulat[e] land use ... perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 (1982).

SUMMARY OF THE ARGUMENT

This Court should decline to carve out the new exception to the FFCA that Petitioners request. Petitioners have not been barred from litigating their federal claims in federal court, but only from relitigating particular issues that the California state courts have decided. That the application of California's issue preclusion law pursuant to the FFCA has led to dismissal of their federal claims means only that Petitioners suffer the commonplace effects of issue preclusion with respect to matters that have already been litigated in state proceedings.

Applying the FFCA in this manner comports with core principles of federalism, because giving issue-preclusive effect to state court judgments promotes comity and acknowledges that state courts are fully competent to adjudicate issues related to federal claims. Contrary to Petitioners' contentions, issue preclusion does not limit their ability to fully and fairly litigate their claims. Both the FFCA and California's law of collateral estoppel amply protect against that result. Finally, application of the FFCA is not contrary to the concerns that animate *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).

Petitioners' recommended approach would impose significant costs on the States and their municipal subunits. Because takings claims typically generate fact-intensive, complex, and protracted litigation, *de novo* relitigation in federal court of issues already decided in state court would be costly, time consuming and wasteful. And the effects of such a rule would be more than fiscal. Petitioners' proposed exception to the FFCA would delay and impair local planning efforts and community development, and would chill state and local governments' efforts to develop sound and responsible land-use policies.

POINT I

THE FULL FAITH AND CREDIT ACT PROHIBITS PETITIONERS FROM RELITIGATING *DE NOVO* TAKINGS ISSUES THAT HAVE BEEN FULLY AND FAIRLY DECIDED BY STATE COURTS.

Petitioners' proposed exception to the usual rules of collateral estoppel is unsupported by the case law, fails to take account of the requirements of the Full Faith and Credit Act, and, if adopted by this Court, would significantly diminish the States' constitutionally-guaranteed status as independent sovereign entities.

1. The plain meaning of the FFCA prohibits plaintiffs in Petitioners' position from relitigating in federal court issues that have already been decided by a state court. The FFCA requires that the "judicial proceedings" of a state be given "the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken." 28 U.S.C. § 1738. Consequently, if state law would bar relitigation of

an issue in the courts of that state once judgment has been rendered, the FFCA requires that the federal court apply the same rule and deny reconsideration of that issue in the federal courts. *See Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 373 (1996) (The FFCA "directs all courts to treat a state-court judgment with the same respect that it would receive in the courts of the rendering state.").

In *San Remo Hotel v. City and County of San Francisco* ("*San Remo II*"), 41 P.3d 87, 27 Cal. 4th 643 (2002), the California Supreme Court rejected Petitioners' facial and as-applied state takings claims. *See id.* at 107-11, 27 Cal. 4th at 672-79. In evaluating these claims, the California court held that, for all relevant purposes, the state and federal takings laws were congruent, and it therefore "analyze[d plaintiffs' state] takings claim under the relevant decisions of both this court and the United States Supreme Court." *Id.* at 100-01, 27 Cal. 4th at 664. Applying federal and state law, the court held that Petitioners could not prevail on either their facial or as-applied challenge. *Id.* at 107-11, 27 Cal. 4th at 672-79.

California law governing issue preclusion would bar Petitioners from relitigating the legal and factual issues decided by the California Supreme Court in *San Remo II*. Under California law, "[c]ollateral estoppel precludes relitigation of issues argued and decided in prior proceedings" if the following conditions are satisfied:

> First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

Lucido v. Superior Court, 795 P.2d 1223, 1225, 51 Cal. 3d 335, 341 (1990).

All of these conditions are met in this case. First and most importantly, because for all relevant purposes the California Supreme Court "construe[s] the [state and federal takings] clauses congruently," and analyzed Petitioners' claim "under the relevant decisions of both this court and the United States Supreme Court," *San Remo II*, 41 P.3d at 100-01, 27 Cal. 4th at 664, there is no question but that the factual and legal issues Petitioners now seek to litigate are identical to those already decided. *See San Remo Hotel L.P. v. San Francisco City & County* ("*San Remo III*"), 364 F.3d 1088, 1096-98 (9th Cir. 2004) (agreeing with the California Supreme Court's analysis). Not surprisingly, in their brief to this Court, Petitioners cannot identify a single factual or legal issue they wish to litigate in federal court that has not already been decided in the state proceedings. In addition, the takings issues were fully litigated and necessary to the California court's final decision on the merits, *see San Remo II*, 41 P.3d at 107-11, 27 Cal. 4th at 672-79, thereby satisfying the second, third and fourth criteria listed in *Lucido*. Finally, Petitioners were the plaintiffs in the California action, satisfying the fifth threshold condition. Because state law gives the California Supreme Court's decision issue-preclusive effect, the FFCA requires that it be accorded the same effect in federal court.

2. Petitioners therefore can prevail only if their claim falls within an exception to the FFCA. For the reasons identified by Respondents in their merits brief, neither of the established exceptions to the FFCA applies here, and this Court should reject Petitioners' invitation to carve out a new one similar to that fashioned by the Second Circuit in *Santini*. Petitioners suggest that because *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), required them first to seek compensation in the California courts, it would be unfair to use the results of those state court proceedings to bar them from renewing their federal claims in federal court. That alleged unfairness is grossly overstated, and certainly does not justify creating a novel exception to the FFCA to accommodate Petitioners.

In fact, the FFCA does not bar Petitioners from bringing their federal takings claims in federal court. Rather, the FFCA prevents only the relitigation of those issues of fact and law that are relevant both to Petitioners' federal claims and to their already-litigated state claims. Accordingly, the Ninth Circuit did not hold that Petitioners could not bring their federal claims in federal court. Rather, it held only that the FFCA and California's law of collateral estoppel did not permit Petitioners to relitigate those factual or legal issues that had already been decided by the California courts. *See San Remo III*, 364 F.3d at 1094-95. And it reached this decision only after independently determining that "[t]he California Supreme Court's [takings] analysis was . . . equivalent to the approach taken [by the Ninth Circuit]." *Id.* at 1097.

In this case, Petitioners happen to be vulnerable to dismissal of their federal claims as a result of the state court judgment, but only because California interprets its takings clause congruently with the federal takings clause. Where state and federal takings law differ and a plaintiff has properly reserved a federal takings claim, however, there may well be no bar to litigating a federal takings claim in federal court after the state takings claim has been adjudicated. *See, e.g. Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) (no issue preclusion because Oregon law did not recognize takings based on investment-backed expectations). In sum, issue preclusion — unlike claim preclusion — implicates only a plaintiff's ability to relitigate issues already adjudicated. It does not, standing alone, take away a plaintiff's access to federal court.

3. Petitioners also contend, as the Second Circuit suggested in *Santini*, that it would be unfair to apply the FFCA to prevent them from relitigating in federal court issues already decided by a state court. But the FFCA, along with state laws of collateral estoppel, protect rather than thwart Petitioners' opportunity for a full and fair litigation of their federal claims. The only result that could surely be called unfair – and in deep tension with core principles of federalism – would be to deny a state-court judgment legitimate issue-preclusive effect.

As a general matter, issue preclusion is required by the principle of comity between state and federal courts. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 463 (1982) (recognizing the "principles of comity and repose embodied in § 1738"). As this Court has recently reaffirmed, "[f]ederal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity,

not competition and conflict, are essential to the federal design." *Kowalski v. Tesmer*, 125 S. Ct. 564, 569 (2004) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999)). It is therefore a central feature of our federalist system that the judgment of a state court is not subject to review by the lower federal courts, which would be the effective result of denying preclusion in this case. *See, e.g.*, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). To ignore a state court's decision on issues that are necessary to its judgment on the merits is to strip that judgment of its finality and effectiveness – a result that "would violate basic tenets of comity and federalism." *Kremer*, 456 U.S. at 478.

Amici States also strongly object to the "general distrust of the capacity of the state courts to render correct decisions," *Allen*, 449 U.S. at 105, that underlies Petitioners' request for a right to relitigate issues in a federal forum. That attitude is not only disrespectful of the States, but cannot be squared with "this Court's emphatic reaffirmation . . . of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so." *Id.*; *see also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 275 (1997) ("A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism.").

Nor does it make a difference if the relevant issues involve questions of federal law, for state courts are fully competent to decide such matters:

> Interpretation of federal law is the proprietary concern of state, as well as federal, courts. It is the right and duty of the States, within their own judiciaries, to interpret and to follow the Constitution and all laws enacted pursuant to it, subject to a litigant's right of review in this Court in a proper case. The Constitution and laws of the United States are not a body of law external to the States, acknowledged and enforced simply as a matter of comity. The Constitution is the basic law of the Nation, a law to which a State's ties are no less intimate than those of the National Government itself. The separate States and the Government of the United States are bound in the common cause of preserving the whole constitutional order. Federal and state law "together form one system of jurisprudence."

Coeur D'Alene Tribe, 521 U.S. at 275-76 (quoting *Claflin v. Houseman*, 93 U.S. 130, 137 (1876)); *see also The Federalist* No. 82, p. 493 (A. Hamilton) (Rossiter ed. 1961) ("When . . . we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.")

Recognizing the general competence and jurisdiction of the state courts, this Court has rejected the "principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises." *Allen*, 449 U.S. at 103. In accordance with these tenets, the FFCA "embodies the view that it is

more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984). In short, a plaintiff suffers no harm from having issues related to a federal claim determined by the state courts.

Nor can Petitioners reasonably assert that the application of issue preclusion denies them a chance to fully and fairly litigate the relevant issues. In construing the FFCA, this Court has held that state proceedings must satisfy the "procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer*, 456 U.S. at 481. A further layer of protection is provided by the FFCA's requirement that a federal court, when deciding if a state-court judgment should be given preclusive effect, must apply that state's law of collateral estoppel. *See Matsushita Electric*, 516 U.S. at 373. In this case, for example, Petitioners are protected by California's rule that collateral estoppel may only be applied to issues that have been previously decided on the merits and are subject to a final judgment, and where the party against whom preclusion is sought is the same as, or in privity with, the party to the former proceeding. *Lucido*, 795 P.2d at 1225, 51 Cal. 3d at 341. While other states differ in the details, all limit issue preclusion in a manner that ensures parties a full and fair opportunity to litigate the matters involved in subsequent claims. *See generally* 46 Am. Jur. 2d *Judgments* §§ 539-552 (2004); Restatement (Second) of Judgments §§ 27-29 (1982).

4. Finally, contrary to the Second Circuit's reasoning in *Santini*, 342 F.3d at 128-30, application of issue preclusion to Petitioners' federal claims in no way conflicts with the

concerns underlying *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411. *England* held that a plaintiff who has invoked the jurisdiction of the federal courts may, when faced with *Pullman* abstention, reserve the right to have its federal claims litigated in those courts upon conclusion of the state-court proceedings. *Id.* at 421-22. *England*, however, recognized only a plaintiff's legitimate interest in avoiding *claim* preclusion. Its ruling was based on the "fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional *claims* can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination *of those claims*." *Id.* at 415 (emphasis added).

In fact, Petitioners have received exactly what *England* guarantees: access to the forum of their choice for their federal claims. Their only complaint is that the issues they litigated in the state-court proceeding will prevent them from succeeding on the merits on the claims they now bring in federal court. But the right provided in *England* to raise a claim in federal court does not also include a right to have each and every issue connected with that claim decided by a federal court. Contrary to what the Second Circuit thought, and Petitioners now contend, *England* does not require "an exception to the applicability of collateral estoppel for plaintiffs who litigate state-law takings claims in state court solely to comply with the ripeness requirement of [*Williamson County*]." *Santini*, 342 F.3d at 121. Instead, as demonstrated above, the plain meaning of the FFCA, principles of federalism and fairness, and this Court's decisions in *Allen* and *Migra* (both postdating *England*) all mandate according state judgments in such cases issue-preclusive

effect. *See Migra*, 465 U.S. at 84; *Allen*, 449 U.S. at 103-04; *see also id.* at 101 n.17 (distinguishing the interests at stake in *England*).

POINT II

DUPLICATE TAKINGS TRIALS WOULD UNDULY BURDEN GOVERNMENTS AND COURTS, AND WOULD INHIBIT TIMELY AND EFFECTIVE LAND-USE PLANNING.

Requiring federal takings claims to be fully relitigated in a second proceeding in federal district court following a state court adjudication of cognate state-law claims would unduly burden state and local governments, as well as the federal courts. Exempting plaintiffs who litigate state takings claims in state court from collateral estoppel would necessitate addressing anew issues of fact and law that have already been decided, for no reason other than to give plaintiffs another bite at the apple. Moreover, the delay inherent in such a scheme can be expected to impair local and state planning efforts and community development. Finally, the additional burden of a second judicial proceeding could well have a chilling effect on government efforts to develop and implement land-use regulations.

1. Regulatory takings claims generally involve intensely *ad hoc* factual inquiries. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Palazzollo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, *J.*, concurring). The States' collective experience confirms that property owners, regulators, and courts expend significant resources and time adjudicating takings claims – be it a *Lucas* claim involving background principles of nuisance law, a *Del Monte*

claim that a regulation does not "substantially advance" a legitimate governmental interest, or a *Penn Central* claim alleging that a regulation diminishes the value of a property and interferes with reasonable investment-backed expectations. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Penn Central*, 438 U.S. at 124.

Consequently, litigating a takings claim once, much less twice, is an expensive proposition for state and municipal governments. A 1992 survey of municipal officers indicated that in the previous two years "in most cities, litigation costs [rose] at a rate far in excess of the inflation rate." Susan A. MacManus, *The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms*, 44 Syracuse L. Rev. 833, 834 (1993). Among the factors survey respondents identified as driving the increase was "an explosion in the non-traditional use of civil rights statutes . . . to include cases involving such areas as zoning and land development." *Id.* at 836-37. In fact, nearly seventy-percent of survey respondents identified cases involving inverse condemnation or land use/zoning as among the cases "contributing most to their rising litigation costs" in the three years preceding the inquiry. *Id.* at 839-40, 850 (Table 6).

These cases cost so much because they are lengthy and complex and often require reliance on outside counsel and expensive expert witnesses. *See id.* at 840. Preparation for a regulatory takings claim frequently necessitates inquiries into the property's chain of title, historic use, and the effects of the proposed development, as well as the presentation of this information through extensive documentary evidence and verbal testimony. Parties often need to retain expert witnesses

– such as appraisers, architects, contractors, engineers, economists, geologists and biologists – to assist in preparing and litigating their cases. These experts may be required to address a wide range of issues, including economic theory,[1] appraisal and valuation,[2] land-use planning and zoning,[3] environmental impacts,[4] traffic patterns,[5] and health concerns.[6] Parties frequently must prepare maps, photographs and demonstrative exhibits, which often necessitate the use

[1] *See, e.g., Chevron v. Cayetano*, 198 F. Supp. 2d 1182, 1184-92 (D. Haw. 2002), *aff'd*, 363 F.3d 846 (9th Cir.), *cert. granted sub nom. Lingle v. Chevron*, 125 S. Ct. 314 (2004) (discussing evidence of economic effects of caps on rental prices).

[2] *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226, 1243-45 (D. Nev. 1999), *aff'd in part, rev'd in part*, 216 F.3d 764 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002) (discussing expert appraisal testimony as to the value of high hazard lands); *Sag Harbor Port Assocs. v. Village of Sag Harbor*, 21 F. Supp. 2d 179, 182 (E.D.N.Y. 1998) (describing appraiser testimony on value of land subsequent to re-zoning).

[3] *See, e.g., Gazza v. N.Y. Dep't of Env. Cons.*, 217 A.D.2d 202, 206, 212-13 (2d Dep't 1995) (discussing testimony of zoning attorneys as to likelihood that land owner could obtain variance).

[4] *See, e.g., Del Monte*, 526 U.S. at 699-700 (noting evidence designed to undermine city's asserted factual premise for denying a development permit).

[5] *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 395-96 (1994) (noting insufficient evidence regarding traffic impacts resulting from expansion of store and possible mitigation measures).

[6] *See, e.g., John R. Sand & Gravel Co. v. United States*, 62 Fed. Cl. 556, 579-89 (2004) (describing testimony of public health experts regarding ground water contamination).

of highly technical Geographic Information Systems ("GIS") data, to depict the parcel and its characteristics. Some claims, such as those alleging that a regulation lacks a sufficient nexus to legitimate government interests, are especially resource-intensive to litigate, because they require a prediction in evidentiary form about the particular effect a challenged regulation would likely have both in the future and throughout the jurisdiction. *See, e.g., Chevron*, 198 F. Supp. 2d at 1184-92.

The burden of litigating a regulatory takings claim in *one* court system alone is exemplified by the litigation in *Gazza v. New York State Department of Environmental Conservation* ("*Gazza I*"), 159 Misc. 2d 591 (Sup. Ct., Suffolk County, 1993), *aff'd* ("*Gazza II*"), 217 A.D.2d 202 (2d Dep't 1995), *aff'd* ("*Gazza III*"), 679 N.E.2d 1035, 89 N.Y.2d 603; *cert. denied*, 522 U.S. 813 (1997). The petitioner in *Gazza* brought a regulatory takings challenge to a determination by the New York Department of Environmental Conservation ("DEC") that he was not entitled to a Tidal Wetlands Permit that was required in order for him to build a home. As the trial court noted, in a hearing that played out over approximately two-and-a-half months, the petitioner's witnesses included himself, as well as "an engineer, a surveyor, a marine operator, a dock builder, a real estate appraiser, and an attorney who specializes in zoning matters." *Gazza I*, 159 Misc. 2d at 592. For its part, the DEC "called an engineer, a zoning attorney, a real estate appraiser, and an adjoining landowner." *Id.*; *see also Gazza II*, 217 A.D. 2d at 205-06 (discussing testimony of appraisers, environmental consultant, and outside lawyers). In addition to the costs incurred at trial, the DEC bore the costs of appeals in the New York Appellate Division and Court of Appeals, with

the entire process from petition to final resolution spanning approximately five years.[7]

This description illustrates the burdens that takings challenges often impose on state and local governments. Such cases, of course, represent only the costs of state-court proceedings. Those costs would be largely replicated if subsequent, duplicative federal proceedings were to be permitted. Giving plaintiffs a second, federal bite at the apple would consume substantial resources of governments already hard-pressed by many educational, environmental, public

[7] New York courts provide a "two-step" review of this category of permitting decisions, asking first whether the permit denial is supported by substantial evidence in accordance with the relevant statutes and therefore valid, and second whether the restriction constitutes an unconstitutional taking requiring compensation. *See Gazza III*, 679 N.E.2d at 1039, 89 N.Y.2d at 612-613. Some property owners challenge the state agency's determination on both of these grounds, which results in even more time-consuming court proceedings. For example, in *Brotherton v. DEC*, 189 A.D.2d 814 (2d Dep't 1993), *on remand*, 172 Misc. 2d 334 (Sup. Ct., Suffolk County, 1997), *aff'd*, 252 A.D.2d 498 (1998), New York's Appellate Division first determined in January 1993 that the state agency's denial of a wetland permit was supported by substantial evidence. 189 A.D.2d at 816. The case then returned to the trial court for considerations of the petitioner's takings claims. *See* 172 Misc. 2d at 335. At a two-day hearing, the DEC called three expert witnesses: a DEC environmental engineer, a licensed real estate appraiser, and a DEC wetlands biologist/aerial photograph interpreter. To prepare for the hearing, the DEC also was required to produce several large-format aerial photographs, on which much of the case turned, to conduct a title search, and to identify and analyze historical documents and photographs. *See id.* at 336-38. The DEC was then subject to the cost of an appeal of this determination, which finally in July 1998 resulted in an affirmance of the judgment against the petitioner. 252 A.D.2d at 499.

safety, medical, and other demands. Neither the law nor common sense requires such a waste of funds.

2. Duplicative litigation of takings issues will not only burden States, municipalities, and their regulators with additional litigation costs, but can also be expected to delay implementation of land-use decisions, resulting in a regulatory uncertainty that will hamstring both regulators and developers.

Takings litigation is not only expensive, but is also protracted. The duplicative federal litigation to which Petitioners assert they are entitled would commence with a new complaint, perhaps followed by additional discovery, and then certainly resulting in a new round of pre-trial motions. Briefing, arguing and resolving dispositive motions in federal court routinely takes months or even years. Nor would litigation end with the second trial. Appeals often continue for many months and often years. *See, e.g., W.J.F. Realty Corp. v. Town of Southampton*, 220 F. Supp. 2d 140, 142-45 (E.D.N.Y. 2002) (describing eleven-year history of ongoing state and federal takings challenge to local land-use regulation and the Long Island Pine Barrens Protection Act).

These litigation delays have a real impact on governments, communities and landowners. Government planning efforts are often put on hold while takings cases work their way to resolution. Other permit decisions are suspended until there is regulatory certainty. For communities, the delay in the final determination regarding use of a major parcel of land can mean a long wait for other related development efforts. And since a large development project can significantly affect the character of the entire community, delay has far-ranging repercussions.

3. Finally, the burden of additional litigation threatens to chill appropriate land-use regulation by state and local governments. Where reasonable land-use controls, even if clearly required by law, invite extensive and time-consuming litigation, States and municipalities will be reluctant to implement them. For example, a government employee may well hesitate before issuing (or denying) a land-use permit if her decision is likely to lead to burdensome litigation. Even if she believes her decision will be upheld as correct, the inhibitory effect will still be substantial.

The Department of Justice, in opposing a proposed congressional effort to expand federal jurisdiction over takings claims, recognized the potential for just such a chilling effect. Expanding federal jurisdiction, the DOJ stated, would:

> hand[] developers a powerful new weapon in their negotiations with community officials: the threat of premature and potentially expensive Federal court litigation. This new weapon could well be used to disrupt State procedures designed to protect public health, safety, public resources and the environment. Confronted with the prospect of a potentially costly and time-consuming Federal court lawsuit, State and local officials would feel new pressure to approve land use proposals to avoid litigation, even if the proposed use might harm neighboring property owners and the community at large.

DOJ Letter to Hon. Charles T. Canady, Chairman, Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives, dated September 14, 1999, *reprinted in* H.R. Rep. No. 106-518, at 39 (2000).

In sum, the relitigation of takings claims would impose both direct and indirect harms on governments and communities. It would absorb already-scarce resources, delay planning and development efforts, and suppress land-use restrictions against the public interest. The Amici States urge the Court to free them of this unnecessary and counterproductive burden.

CONCLUSION

For the foregoing reasons, the Amici States urge this Court to affirm the decision of the Ninth Circuit Court of Appeals.

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No. 04-340

In the

Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, and T&R INVESTMENT CORP.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

1. Is a Fifth Amendment Takings claim barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE PLAIN LANGUAGE OF *WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION* SAYS THAT FEDERAL TAKINGS CLAIMS ULTIMATELY CAN BE RESOLVED IN FEDERAL COURTS 4

II. FEDERAL COURTS MUST DEFINE THE CONTOURS OF FEDERAL TAKINGS LAW; THAT RESPONSIBILITY CANNOT BE LEFT TO THE STATE COURTS 10

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases

Ali v. City of Los Angeles, 91 Cal. Rptr. 2d 458 (Ct. App. 1999) 15, 16

City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997) 9

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 2

Dodd v. Hood River County, 136 F.3d 1219 (9th Cir. 1998), *cert. denied*, 525 U.S. 923 (1998) 6

Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995) .. 6

Dolan v. City of Tigard, 512 U.S. 374 (1994) ... 2, 9-10, 15

England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964) 2-3, 6, 11-12

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 2, 5

Galland v. City of Clovis, 16 P.3d 130 (Cal.), *cert. denied*, 534 U.S. 826 (2001) 10

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 2, 15

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 10

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 1, 15

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TABLE OF AUTHORITIES—Continued

Page

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Williams v. Taylor, 529 U.S. 362 (2000) 10

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 2-5

Yee v. City of Escondido, 503 U.S. 519 (1992) 2

Supreme Court Rules

Rule 37.3(a) 1

Rule 37.6 1

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TABLE OF AUTHORITIES—Continued

Page

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TABLE OF AUTHORITIES—Continued

Page

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Roberts, Thomas E., *Procedural Implications of* Williamson County/First English *in Regulatory Takings Litigation: Reservations, Removal, Diversity, Supplemental Jurisdiction,* Rooker-Feldman, *and Res Judicata*, 31 Envtl. L. Rev. 10353 (2001) 11

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Yuhas, George A., *The Ever-Shrinking Scope of Federal Court Takings Litigation*, 32 Urb. Law. 465 (2000) 11

INTEREST OF AMICI CURIAE[1]

For more than 30 years, Pacific Legal Foundation (PLF) has litigated in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF also has participated as amicus curiae in nearly every other major real property takings case heard by this Court in the past three decades.

PLF previously participated as amicus curiae in this case and the related state court case. PLF filed amicus briefs in support of San Remo Hotel, L.P., Thomas Field, Robert Field, and T&R Investment Corp. (Petitioners herein) before this Court (on petition for writ of certiorari), the Ninth Circuit Court of Appeals, the United States District Court for the Northern District of California, the California Supreme Court, and the California Court of Appeal.

Amicus National Association of Realtors (NAR) is a nonprofit association representing over one million members engaged nationwide in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote

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[1] Pursuant to Rule 37.3(a), all parties have consented to the filing of this amicus curiae brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution to the preparation or submission of this brief.

professional competence. Its members contribute to such activities as promotion of equal opportunity in housing, real estate licensing, neighborhood revitalization, safeguarding real property rights, public service, and cultural diversity. The National Association of Realtors has participated as amicus curiae in numerous property rights cases before this Court, including *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

Amici Paul and Sherry Lambert (the Lamberts) and Charles and Nell Sweeney (the Sweeneys) each want to build single-family homes on their neighboring beachfront lots located on the island of Maui, Hawaii. The County of Maui initially determined that the Lamberts' and the Sweeneys' homebuilding plans were exempt from coastal zone permitting requirements. The County issued multiple building permits, which were later rescinded without predeprivation notice or hearing, and in violation of the County's procedures which do not allow rescission of coastal zone exemptions or permits. The Lamberts and Sweeneys each filed lawsuits in the federal court to vindicate their federal claims for regulatory takings and due process violations under 42 U.S.C. § 1983, and in the state court for their state law takings and due process claims. In the state court actions, the Lamberts and the Sweeneys reserved their federal claims. Pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), they notified the court and the parties that they were not litigating their federal claims in state court, but were in state court only to ripen their takings claims as required by *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

The case at bar is of overwhelming importance to the Lamberts and the Sweeneys because they suffer from the uncertainty brought about by the rule adopted by the Ninth Circuit that surrenders resolution of federal takings claims to state courts. The Lamberts and the Sweeneys were forced to file multiple lawsuits and must suffer the uncertainty of not knowing whether their *England* reservations will be respected, and whether by pursuing just compensation in state court, their federal claims will be barred by state rules of issue preclusion.

Amici file this brief to assist the Court in considering the conditions under which property owners may present their claims for recovery of compensation for harm to private property under the Fifth and Fourteenth Amendments to the United States Constitution in a federal forum. Specifically, Amici argue that *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, on its face, does not deny, and must not be interpreted to deny, property owners the opportunity to have federal takings claims heard and decided in federal courts.

SUMMARY OF ARGUMENT

The special ripeness requirements of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985), regularly are applied to preclude property owners from litigating federal takings claims in the federal courts. That is not what this Court intended; *Williamson County* itself holds out the promise of federal adjudication of federal takings claims. In *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), this Court emphasized the importance of allowing litigants to have their federal claims decided in the federal courts. It is just as important to the development of the law. The federal courts are precluded from defining the contours of federal takings law when federal takings claims are relegated to the state courts.

England offers a procedure by which claimants who are in state court against their will are able to reserve their federal claims for subsequent federal adjudication. This Court should make it clear that when property owners are forced into state court to ripen their takings claims, and when those claimants expressly reserve their federal claims for later resolution in federal court, the state-law claim will have no preclusive effect in the subsequent federal action.

ARGUMENT

I

THE PLAIN LANGUAGE OF *WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION* SAYS THAT FEDERAL TAKINGS CLAIMS ULTIMATELY CAN BE RESOLVED IN FEDERAL COURTS

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. at 195, this Court established a test for determining if a takings case is ready to be heard in federal court. First, administrative action must be final, and second, a plaintiff must have sought "compensation through the procedures provided by the State." *Id.* Only the second requirement is relevant to the instant case. And as to that requirement, this Court explained that

> because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation *before* bringing a § 1983 action.

Id. at 195 n.13 (emphasis added).

The plain language of *Williamson County* holds out the promise of federal adjudication of a federal takings claim.

> Throughout the opinion, the Court returns to these twin concepts [not ripe and premature], emphasizing and reemphasizing the temporal nature of its holding, repeatedly saying that land use cases *can be ripened* and *then litigated in federal court*.

Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J.L. & Pol'y 99, 104 (2000) (emphasis added). *See* Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239, 249 (2000) ("The language of *Williamson* suggests that a federal claim will survive after disposition in the state court.").

The requirements of *Williamson County*, considered in isolation, seem clear. For a short time, property owners could still bring takings claims in federal court on the grounds that a State did not provide an adequate remedy. *Williamson County*, 473 U.S. at 194, 197 (The ripeness requirements apply "if a State provides an adequate procedure for seeking just compensation."). But two years after *Williamson County* was decided, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315-16 (1987), this Court said that state courts must provide adequate procedures for recovery of just compensation when government takes private property. *Williamson County* and *First English*, read together, require that property owners seek and be denied compensation in state court before bringing a federal takings claim in federal court. *See* Michael M. Berger, *Vindicating the Rights of Private Land Development in the Courts*, 32 Urb. Law. 941, 950 (2000).

Any hint of clarity disappeared when the lower federal courts were forced to resolve the preclusion questions that inevitably arose when property owners appeared in federal court after seeking to ripen their federal takings claims in state court as required by *Williamson County*. The ever increasing body of case law reflects the inability of most lower federal courts to resolve the questions in a manner that avoids long, onerous litigation and that ultimately allows property owners to litigate their claims in federal courts. The case presently before this Court provides a good example. Another good example is found in *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) (*Dodd I*), and *Dodd v. Hood River County*, 136 F.3d 1219, 1224 (9th Cir. 1998) (*Dodd II*), *cert. denied*, 525 U.S. 923 (1998). In *Dodd I*, 59 F.3d at 862, the Ninth Circuit Court of Appeals ruled that claim preclusion did not prevent litigation of the Dodds' federal takings claim in federal court after they had litigated their state takings claim in state court. The Dodds had expressly reserved their federal claim pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411. *Dodd I*, 59 F.3d at 857, 862. The Ninth Circuit Court disagreed with a suggestion that "*Williamson County* is a thinly veiled attempt by the [Supreme] Court to eliminate the federal forum for Fifth Amendment taking plaintiffs and that any federal remedy is limited to actions based on inadequate taking procedure in the state court." *Id.* at 861. The Dodds returned to the Federal District Court, which then held that issue preclusion barred litigation of their federal claim in federal court; the Ninth Circuit Court affirmed. *Dodd II*, 136 F.3d at 1227-28. The federal forum was effectively eliminated in spite of the Ninth Circuit Court's belief that was not the intent of *Williamson County*.

The lower federal courts' application of the standard rules of issue preclusion to cases ripened under *Williamson County* ensures that most takings claims can never be litigated in federal court. *Williamson County* does not, as the plain language of the opinion states, present a temporary delay on the path to federal court. Rather, as applied by the lower federal courts, *Williamson County* sets a permanent jurisdictional bar by applying state rules of issue preclusion when property owners attempt to have federal takings claims heard in federal court. *See* J. David Breemer, *Overcoming* Williamson County*'s Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 240 (2003). *Also see* John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195, 234-36 (1999), which includes testimony of Daniel R. Mandelker[2] before the House Judiciary Committee Subcommittee on Courts and Intellectual Property. Professor Mandelker expressed his opinion that "federal judges have distorted the Supreme Court's ripeness precedents to achieve an undeserved and unwarranted result: they avoid the vast majority of takings cases on their merits." *Id.* at 236.

If the absurdity of extinguishing federal takings claims by ripening them is not readily apparent, it becomes so when the *Williamson County* ripeness requirements are applied to claims brought to protect other federal constitutional rights, such as, in the example below, free speech.

> [A] mayor objects to a speech critical of his administration and refuses to allow it to be delivered

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[2] Professor of law at the University of Washington in St. Louis, Missouri, and a prolific author on the law of zoning and land use planning.

> in the city's main square or on its public cable TV station for that reason. The speaker goes to federal court, which exercises *Pullman* abstention. She then bargains with the mayor's office over possible revisions to her draft, each time being turned down with the encouragement to try again. Finally, she obtains a denial or determines that further application is futile. Then she works her way through the hierarchy of state courts. Several years later, she gets back to federal court, only to learn that the local trial court determinations of critical facts and the state intermediate court's rulings of law are dispositive of the issues.

Steven J. Eagle, *Regulatory Takings* § 13-5(d) at 1069-70 (2d ed. 2001).

The duplicative, protracted, and ultimately unsuccessful procedures for ripening a federal claim for violation of the right to free speech are ridiculous; they are no less so in the context of constitutional property rights. But the fact is that *Williamson County* presents "a special ripeness doctrine applicable only to constitutional property rights claims." Timothy Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W.L. Rev. 1, 2 (1992). Others seeking to vindicate their federal constitutional rights under 42 U.S.C. § 1983 can choose between the federal and state courts in the first instance. 1 Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation*, ch. 1, § 1.1, at 1-3 to 1-4 (2004). Under *Williamson County*, those seeking to enforce rights secured by the Fifth Amendment to the United States Constitution do not have a choice.

After this Court's decision in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), state and local government defendants can remove Takings Clause claims from state court. So, "[a]pparently only property owner takings and substantive due process claims are relegated to state court review under the *Williamson* ripeness doctrine." Robert H. Freilich, et al., *Federalism at the Millennium: A Review of U.S. Supreme Court Cases Affecting State and Local Government*, 31 Urb. Law. 683, 685 (1999).

Others are equally dismayed.

> [I]f we were to take the *Williamson County* reasoning as reflecting reasoned constitutional doctrine, we would have to conclude that plaintiffs claiming any deprivation of constitutionally protected rights without due process of law–the life's blood of 42 U.S.C. § 1983 litigation—should not be able to sue in federal courts either, without a preliminary detour through the state courts in an effort to secure from them the lacking due process. But that, of course, is not generally prevailing law—it is only a "rule" concocted specifically for plaintiff-landowners seeking redress of violation of their constitutional property rights in the context of land-use regulations.

See Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 Urb. Law. 307, 327-28 (1998).

This different treatment of takings plaintiffs exists in spite of this Court's pronouncement that there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan v.*

City of Tigard, 512 U.S. 374, 392 (1994).[3] If that is so, it is inconceivable why application of *Williamson County*'s ripeness doctrine makes state courts the first and only arbiters of federal constitutional takings claims brought pursuant to 42 U.S.C. § 1983, which Congress enacted for the specific purpose of opening "the doors of the United States courts' to individuals who were threatened with, or who suffered, the deprivation of constitutional rights . . . ." *See Patsy v. Bd. of Regents of the State of Florida*, 457 U.S. 496, 504 (1982) (citations omitted).

II

FEDERAL COURTS MUST DEFINE THE CONTOURS OF FEDERAL TAKINGS LAW; THAT RESPONSIBILITY CANNOT BE LEFT TO THE STATE COURTS

When federal judges exercise their federal-question jurisdiction under the "judicial power" of Article III of the Constitution, it is "emphatically the province and duty" of those judges to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). "At the core of this power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several states—to interpret federal law." *Williams v. Taylor*, 529 U.S. 362, 378-79 (2000).

[3] In dissent to a property rights decision by the California Supreme Court, Associate Justice Janice Rogers wrote as follows: "The Constitution bespeaks no hierarchy of rights, no preferences with respect to its constraints on government action, no partiality among its protections of liberty." *Galland v. City of Clovis*, 16 P.3d 130, 166 (Cal.) (Brown, J., dissenting), *cert. denied*, 534 U.S. 826 (2001).

The federal courts do not contribute to the development of the law pertaining to Fifth Amendment takings when takings claims ripened through state procedures are precluded from resolution in the federal courts by claim or issue preclusion. State courts will decide when compensation is appropriate and how it should be measured (*see* George A. Yuhas, *The Ever-Shrinking Scope of Federal Court Takings Litigation*, 32 Urb. Law. 465, 475 (2000)), and the only remaining federal court review is direct review by this Court (*see id.* at 466). Some commentators suggest that is acceptable,[4] but this Court disagreed in *England v. Louisiana State Board of Medical Examiners*. In *England*, this Court said that appellate review by the High Court does not provide adequate recourse to those who want to litigate federal claims in federal court.

> It is true that, after a postabstention determination and rejection of his federal claims by the state courts, a litigant could seek direct review in this Court. But such review . . . is an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. It is the typical, not the rare, case in which constitutional

[4] *E.g.*, Thomas E. Roberts, *Procedural Implications of* Williamson County/First English *in Regulatory Takings Litigation: Reservations, Removal, Diversity, Supplemental Jurisdiction,* Rooker-Feldman, *and Res Judicata*, 31 Envtl. L. Rev. 10353, 10354 (2001); Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under* Williamson County, 26 Ecology L.Q. 1, 34-47 (1999).

> claims turn upon the resolution of contested factual issues. There is always in litigation a margin of error, representing error in factfinding . . . . Thus in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination. The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts.

375 U.S. at 416-17 (internal quotations, citations, and footnote omitted).

England is an abstention case, not a takings case, but this Court's words are equally relevant to Fifth Amendment takings cases.

> [A]s the Court acknowledged in abstention cases, it now seems necessary, as the lowest level of protection affordable to Fifth Amendment property rights, for the Court to acknowledge that in the unique class of land use ripeness cases a trial in state court may be a precondition designed to weed out the cases where relief is granted by state law. Obtaining state court relief may moot the federal issue, but unsuccessful state court litigation "may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in federal courts."

Berger, *Supreme Bait & Switch*, *supra*, at 129-30 (quoting *England v. Louisiana State Board of Medical Examiners*, 375 U.S. at 417).

In *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 129 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 104 (2004), the Second Circuit Court of Appeals applied the

reasoning of this Court's decision in *England v. Lousiana* to conclude that issue preclusion would not bar litigation of a federal takings claim even though Santini initially filed a state takings claim in state court, and litigated and lost that claim before proceeding to federal court. The Court acknowledged that the procedural posture of Santini was different from that of *England*, but said that the distinction "is not a meaningful one." *Id.*[5] The Second Circuit Court, citing to *England v. Louisiana*, relied on the fact that the claimant was not voluntarily litigating his claim in state court. *Id.* at 130. The Court refused to believe that *Williamson County* was intended "to deprive all property owners in states whose takings jurisprudence generally follows federal law . . . of the opportunity to bring Fifth Amendment takings claims in federal court." *Id.* at 130.

The *Santini* Court took what it termed a "middle ground" by recognizing that the preclusion issues arising under *Williamson County* ripeness can be resolved by allowing property owners to reserve their federal claims for later resolution in federal court, and by denying the state-law claim any preclusive effect in the subsequent federal action. *Id.* at 128, 130. One commentator refers to this sort of approach as a "multijurisdictional solution[]." *See* Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 Colum. L. Rev. 1211 (2004). Professor Friedman argues that

> [t]he primary obstacle to a coherent theory of jurisdictional allocation is "either-or" thinking. When scholars and judges discuss jurisdictional

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[5] The Second Circuit Court also recognized that other states do not preclude a claimant from bringing a federal takings claim in state court, as does Connecticut. But, the Court explained, that does not matter. In *England* this Court relied on the fact that the plaintiff was not voluntarily in state court. *Id.* at 130 n.7.

> allocation, the common assumption is that cases must be litigated either in federal or in state court. Rarely is the answer thought to be "both."

Id. at 1214.

But, Professor Friedman continues: "[w]hen interest analysis so requires, cases should be litigated in both the state and federal court systems." *Id.* at 1211. In other words, some cases implicate both state and federal interests, and those cases cannot be assigned to one court without sacrificing the interest of the other. Interest analysis would then require a multijurisdictional approach. *See id.* at 1214, 1274. Such multi-jurisdictional solutions are used in the areas of habeas corpus and certification.[6] *Id.* at 1214.

Professor Friedman recommends expanding use of the *England* doctrine to employ multijurisdictional solutions to state civil cases, such as those where takings plaintiffs are forced into state court under *Williamson County*. *Id.* at 1264, 1268-70. "Preclusion law should provide no more of an obstacle [when litigating a takings claim] than it did in *England* itself." *Id.* at 1270.

Rigid adherence to either-or thinking creates serious problems. For instance, interpreting *Williamson County* in such a way as to cut lower federal courts out of federal takings cases ignores the distinct roles of the Federal Constitution and state constitutions. The United States Constitution "prescribes a floor below which protections may not fall, rather than a ceiling beyond which they may not rise." *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988), *cert. denied*, 498 U.S. 871

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[6] "[C]ertification procedures serve the state interest of allowing a state's highest court to provide an authoritative interpretation of the meaning of state law in a case otherwise properly litigated in federal court to serve federal interests." *Id.* at 1214.

(1990). Thus, it is the federal courts that must set the floor for federal constitutional rights and define the contours of federal law.

State courts are free to interpret rights in state constitutions differently than federal courts interpret similar federal constitutional rights. And, particularly in the area of property rights, they do so regularly. One commentator explored the influence of three of the most prominent modern Supreme Court takings decisions,[7] and concluded that the majority of state court cases mention Supreme Court decisions much more than they actually rely on them.

> The vast majority of state cases often make trivial, passing references to the Supreme court holdings [in *Nollan*, *Lucas*, and *Dolan*]. . . . The U.S. Supreme Court's doctrine has not been ignored by the state courts, but it generally has not been utilized as a basis for limiting community and state land-use and environmental regulation.

Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 Fordham Envtl. L.J. 523, 555 (1995). Although the Supreme Court has handed down a number of what could be termed "pro-landowner" decisions, statistics show that government "overwhelmingly wins litigation" in the state courts. *Id.* at 555.

The California state courts present a particularly egregious example of how some state courts "apply" federal takings decisions. Since 1987, only one published California state court decision has awarded monetary damages in compliance with the "self-executing" nature of the Just Compensation

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[7] *Dolan v. City of Tigard*, 512 U.S. 374, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

Clause. *See Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458 (Ct. App. 1999). For a general description of California's abysmal record in the takings arena, *see* Breemer, *supra*, at 260-63. *Also see San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87 (Cal. 2002) (Brown, J., dissenting), wherein Associate Justice Janice Brown noted that private property is an endangered species in California, and "is now entirely extinct in San Francisco." *Id.* at 120. Justice Brown expressed her "hope the plaintiffs find a more receptive forum in the federal courts." *Id.* at 128.

Federal takings claimants should have the same access to the federal courts as do other constitutional claimants. The federal courts and federal civil rights law were established to provide constitutional claimants with a judicial forum free from local politics and biases.[8]

> Federal judges tend to have broader outlooks than local judges constrained by ethos and electorate of their communities. The fact that there are apt to be more competing interests in their districts also makes them more disposed to vindicate the exercises of property rights that do not benefit immediate neighbors.

Steven J. Eagle, *Regulatory Takings*, § 13-5(d), at 1069 (2d ed. 2001).

[8] *See* Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-parody Stage*, 36 Urb. Law. 671, 704-06 (2004). The authors explain that the theory of protecting federal rights in federal courts dates to the founding of the Republic, and that one reason for adopting the Civil Rights Act was to provide a federal forum.

Strict adherence to the traditional rules of issue preclusion does not allow federal takings claimants to litigate their federal takings claims in federal court, and does not allow the federal courts to shape federal takings law. If *England* and *Williamson County* are to have any practical meaning, then, in the face of a proper reservation, a state-court judgment should have no preclusive effect whatsoever on a later federal claim.

CONCLUSION

This Court phrased the *Williamson County* prerequisites to federal takings litigation in terms of ripeness. The ripeness inquiry in a takings claim involves a determination that a property owner has exhausted all avenues for obtaining compensation.[9] The ripeness requirements cannot and should not extinguish the opportunity to litigate in federal court. As the Second Circuit Court of Appeals recently noted, such a result "would be both ironic and unfair." *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d at 130.

Amici Pacific Legal Foundation, National Association of Realtors, Paul and Sherry Lambert, and Charles and Nell Sweeney respectfully request that this Court recapture the role of the federal courts in developing federal takings law. Amici respectfully request that this Court rule that where takings claimants are forced to ripen federal claims by pursuing state claims in state court, an express reservation of federal claims

[9] Laurence H. Tribe, *American Constitutional Law* 337 (3d ed. 2000).

will actually preserve those claims for litigation in federal court because the normal rules of claim preclusion do not apply.

DATED: January, 2005.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

SAN REMO HOTEL, L.P., THOMAS FIELD, ROBERT FIELD, AND T & R INVESTMENT CORP.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF EVANDRO S. SANTINI AND SANTINI HOMES, INC. OF VERNON, CONNECTICUT, IN SUPPORT OF PETITIONERS SAN REMO HOTEL, L.P., *ET AL.*

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Page

TABLE OF CONTENTS

Interest Of Evandro S. Santini And Santini Homes, Inc. 1

Argument:

This Court Should Overrule The *Williamson County* State Court Requirement Or, In The Alternative, Clarify That Required State Court Litigation Does Not Extinguish, Preclude, Or Limit A Subsequent Federal Claim 9

Conclusion 14

TABLE OF AUTHORITIES

Federal Cases:

Agins v. Tiburon, 447 U.S. 255 (1980) 8

Armstrong v. U.S., 364 U.S. 40 (1960) 10

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) 9

Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995) 7

Dolan v. City of Tigard, 512 U.S. 374 (1994) 5

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987) 4, 6, 8

Hughes v. Washington, 389 U.S. 290 (1967) 10

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) . . . . . *passim*

Mills v. Rogers, 457 U.S. 291 (1982) 3

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 12

Federal Cases, continued: **Page**

Penn Central Transport Co. v. New York City, 438 U.S. 104 (1978) . . . . . *passim*

PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) 3

Santini v. Connecticut Hazardous Waste Management Service, slip op. No. 3:01 cv 563 (WWE), Aug. 27, 2002, (D. Conn.), *affirmed on other grounds*, 342 F.3d 118 (2d Cir. 2003), *cert. denied*, 73 U.S.L.W. 3211 (2004) 1, 2, 6, 8

Snider v. Excelsior Springs, 154 F.3d 809 (8th Cir. 1998) 13

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) . . . *passim*

State Cases:

Melillo v. New Haven, 732 A.2d 133 (1999) 3, 9

Santini v. Connecticut Hazardous Waste Management Service, 739 A.2d 680 (Conn. 1999), *cert. denied*, 530 U.S. 1225 (2000) 1, 4

State Constitutional Provision:

Connecticut Constitution, Article I, §11 3

BRIEF OF EVANDRO S. SANTINI AND SANTINI HOMES, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS SAN REMO HOTEL, L.P., *ET AL.*

Evandro S. Santini and Santini Homes, Inc. of Vernon, Connecticut, have received the parties' consent to file this brief as *amici curiae* through blanket letters of consent filed with the Clerk of the Court.

INTEREST OF EVANDRO S. SANTINI AND SANTINI HOMES, INC.[1]

Evandro Santini has built homes and apartments for 37 years in the suburbs of Hartford, Connecticut. After immigrating to the U.S. in 1957 at age 17, he served several apprenticeships in the building trades. He founded Santini Homes, Inc. in 1970, and has been its president ever since.

From 1994 through 2004, Mr. Santini and his company (hereinafter "Santini") litigated through the Connecticut courts and then the federal courts a temporary taking case that vividly illustrates what commentators and courts have referred to as the *Williamson County* "conundrum" and its jurisdictional "Catch 22." *Santini v. Connecticut Hazardous Waste Management Service*, 251 Conn. 661, 739 A.2d 680 (1999), *cert. denied*, 530 U.S. 1225 (2000); slip op., No. 3:01 CV 563 (WWE), August 27, 2002 (D. Conn.), *affirmed on other grounds*,

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[1] Pursuant to Rule 37.6 of this Court, the *amici* state that no counsel for any party authored any part of this brief, or paid for it. No one other than the *amici* or their counsel have made a monetary contribution to its preparation.

342 F.3d 118 (2d Cir. 2003), *cert. denied*, 73 U.S.L.W. 3211 (2004). Simply summarized, because Santini adhered to the "state-court-first" requirement created by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), it took *ten years* to obtain a ruling on the merits of his Fifth Amendment taking claim. The tortuous path required of Santini illustrates why this requirement should be overruled or at least clarified and mitigated.

Santini's claim arose from a public agency's designation of his under-construction residential subdivision as a finalist for condemnation as a disposal site for low-level radioactive waste. As of June 9, 1991, Santini was building a fully-approved residential subdivision on 74 acres in Ellington, Connecticut. He had been working on the project for six years and had invested $5 million and borrowed $4 million to finance it.

The Connecticut Hazardous Waste Management Service ("Service") is a public instrumentality and political suvdivision of the State. Its principal duty is to oversee the handling and disposal of radioactive materials, including the identification, acquisition, and construction within Connecticut of a disposal facility for low-level radioactive waste.

On June 10, 1991, after two years of secret deliberations, the Service announced that the Santini development was one of three finalist sites for condemnation for public use as a disposal site for in-state generators (utilities, hospitals, universities, and industrial companies) of low-level radioactive waste. Shortly thereafter, the *Hartford Courant* newspaper displayed on its front page a map of the Santini subdivision next to the symbol for radioactivity.

Residents and public officials in Ellington and surrounding towns reacted to the announcement with protests and civil disobedience. In January 1992, Connecticut's governor proposed revocation of the agency's mandate to condemn an in-state site, in favor of seeking a municipality to volunteer. The legislature took four months to adopt the revocation, which was signed into law on May 5, 1992. By this time, however, economic use of the Santini development had been extinguished, and this continued until at least June 1993.

Since, under *Williamson County*, Santini could not bring a threshold taking claim in federal court, he sued (in March 1994) in state court under the takings clause of the Connecticut Constitution, Article I, §11 ("The property of no person shall be taken for public use, without just compensation therefor"). In a 1999 decision, the Connecticut Supreme Court confirmed the accuracy of Santini's 1994 choice of forum and theory of liability, holding under *Williamson County* that a Fifth Amendment taking claim *cannot be joined* with a state law taking claim that is brought in state court. *See Melillo v. New Haven*, 732 A.2d 133, 143 n.28 (1999).

Notwithstanding the exclusive state law basis of his taking claim, Santini expressly argued that the Connecticut courts, when interpreting the state's taking clause, must afford no less protection than is provided by the Takings Clause of the Fifth Amendment to the U.S. Constitution. Citing, for example, *Mills v. Rogers*, 457 U.S. 291 (1982), and *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), Santini explained that decisions of this Court interpreting the Bill of Rights furnish the "floor" for protection of civil rights, and thus in interpreting the state's taking clause, the Connecticut courts needed

to adhere to Fifth Amendment tests and standards. In making this argument, Santini reviewed how Connecticut's two takings tests, which date to the 1960's and 1970's, were inconsistent with current federal standards and, in particular, with this Court's takings test as set forth in *Penn Central Transport Co. v. New York City*, 438 U.S. 104 (1978), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and their progeny.

In November 1999, the Connecticut Supreme Court, in a 5-2 *en banc* decision, affirmed a trial court denial of Santini's taking claim on the basis of two state law principles that were plainly inconsistent with this Court's takings jurisprudence, 739 A.2d 680 (1999). The court framed the dispositive issue as "whether mere government planning may constitute a taking, in the form of an inverse condemnation." It held that "mere governmental planning and temporary steps in anticipation of condemnation" do not, as a matter of Connecticut law, constitute a taking. It further held as a matter of state law that since the Service had never reached a "fixed and irreversible intent" to condemn the Santini property, no taking had occurred. The court cited *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 320 (1987), as stating an analogous, one-factor taking test and a conclusion that "depreciation in value of the property by reason of preliminary [government] activity" cannot constitute a taking.

Because it had resolved Santini's taking claim on these state law bases, the court noted, 739 A.2d at 688 n.19, that it was "not necessary to discuss the plaintiffs' factual claims" of the economic impact of the June 1991 siting designation on their property. *The court then*

rejected as irrelevant the takings jurisprudence of this Court:

> [T]he plaintiffs argue that we may not interpret the Connecticut Constitution so as to provide less protection for individual rights in the use of property than what they refer to as a "minimum, national standard for protection of individual rights in the use of property" as furnished by the "fifth amendment." In the plaintiffs' view, the constitutional doctrine that the federal constitution provides "minimum, national" standards means that, when the United States Constitution is interpreted to grant rights thereunder, our state constitution must be interpreted to grant at least the same level of protection as that granted by the federal constitution. *What is meant by that doctrine, however, is irrelevant to this case.*

739 A.2d at 688 n.20 (emphasis added). The court did not explain further. Finally, the majority dismissed the relevance of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Lucas*, and *Penn Central* "because none of them involves mere planning by the government." 739 A.2d at 689.

Santini petitioned this Court for a writ of certiorari and was denied, 530 U.S. 1225 (2000).[2]

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[2] The Questions Presented were:

1. Whether a state court, adjudicating an inverse condemnation claim that a property owner has brought in that court under a state law provision because a Fifth Amendment takings claim is not yet ripe under this Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank*, must nonetheless adhere to the standards established by this Court's decisions interpreting the Takings Clause of the Fifth Amendment, and may not fashion it own, contrary takings standards.

[footnote continued]

Having satisfied the *Williamson County* state court requirement – after six years of litigation – Santini then brought a Fifth Amendment taking claim in federal district court in early 2001. On August 27, 2002 (in an unreported slip opinion, No. 3:01 cv 563 (WWE)), the court granted the Service's Motion to Dismiss for lack of jurisdiction. After reciting undisputed facts regarding Santini's development during 1984-91, his vested property rights, and his investment-backed expectations prior to June 1991, the court turned to the *Rooker-Feldman* doctrine, describing it as depriving a federal court of subject matter jurisdiction if "the exercise of jurisdiction over that case would result in the reversal or modification of a state court judgment." *Rooker-Feldman*'s prohibition, it said, reached not only claims expressly raised or decided in the state court, but also all claims "inextricably intertwined," with the scope of "intertwined" being determined by applying the elements of res judicata and collateral estoppel.

The court then shifted its focus to *Williamson County* and observed that "Federal law demarcates no clear approach to determine the preclusive effect of a previous

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2. Whether the Connecticut Supreme Court, adjudicating a claim that a state agency economically idled for two years properly on which a subdivision was being built by designating that land as a low-level radioactive waste disposal facility, violated the Takings Clause of the Fifth Amendment by dismissing as "irrelevant" the standards established by this Court in *Penn Central Transportation Company v. New York City, First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* and *Lucas v. South Carolina Coastal Council,* and by holding that because the agency never demonstrated a "fixed and irreversible intent" to condemn, its action was "mere government planning" and could never be a temporary taking as a matter of law.

state court action instituted . . . in order to satisfy [its] ripeness requirement . . . ." It reviewed holdings of the Tenth and Eleventh Circuits that a Fifth Amendment claim *must* be raised in the state court proceedings. It then recited the contrary view of *Dodd v. Hood River County,* 59 F.3d 852 (9th Cir. 1995), that a federal taking claim *may* be brought after state court proceedings, but that the federal court must then determine whether the state court provided a determination "equivalent" to a federal adjudication, "so as to invoke . . . issue preclusion." The district court chose to follow *Dodd.* However, in conducting this search for an equivalent adjudication, the district court focused primarily on whether the Connecticut Supreme Court had engaged in a good faith effort to address the merits of the claim. It *did not* conduct a comparison of whether the Connecticut Supreme Court's 1999 adjudication of Santini's state law claim had employed or adhered to this Court's three-factor *Penn Central* analysis or its categorical *Lucas* formulation. The district court was also "unpersuaded . . . that collateral estoppel or *Rooker-Feldman* is inapplicable in light of the state court's failure to consider the tests set forth in *Lucas* and *Penn Central.*"

Santini appealed. In briefs and arguments in the U.S. Court of Appeals for the Second Circuit, Santini argued principally that because had had no opportunity to litigate a Fifth Amendment claim in the state court, and because the Connecticut courts assuredly did not provide him with the equivalent of an adjudication under *Penn Central* and *Lucas,* the federal district court erred in dismissing the case on jurisdictional grounds.

In August 2003, the Second Circuit reversed the district court on the jurisdictional issues, accepting Santini's argument that he had proceeded in state court involun-

tarily and had been prohibited in that forum from litigating his Fifth Amendment claim. 342 F.3d 118 (2003).[3] However, the Second Circuit reached the merits, holding that the Service's 1991 actions were "precondemnation" activity that had not caused a taking. Santini petitioned this Court for a writ of certiorari,[4] which was denied in 2004.

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[3]By the time the Santini case reached the Second Circuit, the events giving rise to the taking claim had occurred ten to twelve years earlier. Among other things, the defendant's appraiser had died, and had the Second Circuit remanded to the trial court for an evidentiary hearing on the merits, that hearing would have examined events occurring more than a decade earlier.

[4]The Questions Presented were:

1. Did the Second Circuit err in interpreting *Agins v. Tiburon*, 447 U.S. 255 (1980), and *First Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987), as holding that "precondemnation activity" is categorically exempt from liability under the Takings Clause of the Fifth Amendment?

2. Did the Second Circuit contravene several decisions of this Court by holding that an agency's proposed condemnation of an under-construction subdivision for public use as a radioactive waste disposal facility, which action continued for eleven months and undisputedly reduced the property's value from approximately $2 million to zero for at least 24 months and undermined a $5 million equity investment, was not a taking on the grounds that it was incomplete "regulatory" action of "short duration," and protecting the condemnation process from liability was "sound public policy?"

ARGUMENT

THIS COURT SHOULD OVERRULE THE *WILLIAMSON COUNTY* STATE COURT REQUIREMENT OR, IN THE ALTERNATIVE, CLARIFY THAT REQUIRED STATE COURT LITIGATION DOES NOT EXTINGUISH, PRECLUDE, OR LIMIT A SUBSEQUENT FEDERAL CLAIM.

The *Santini* case provides a compelling example of how the *Williamson County* state court requirement consigns a property owner who seeks adjudication of a federal taking claim to a long and tortuous path of litigation that few property owners can sustain, and which effectively denies the protection of the Takings Clause of the Fifth Amendment.

In bringing his taking claim, Santini followed *Williamson County*. He brought his claim in state court under the Takings Clause of the Connecticut Constitution. When he brought his case in state court in 1994, Santini's pleading options were unclear. On the one hand, *Williamson County*, on its face, appeared to say that a federal taking claim did not then exist, which would mean logically that it could not have pleaded, reserved, or stayed. On the other hand, the Connecticut Supreme Court's takings jurisprudence had not been updated to reflect *Penn Central* or *Lucas*, and thus to proceed under the state constitution appeared to require arguing that the state court must overrule several of its earlier decisions. Santini chose to plead the state constitution and argue that the takings cases of this court provided the floor for interpreting the state's takings clause. Santini's pleading choice in this regard was subsequently validated by this Court in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710 (1999) (a Fifth Amendment taking claim "did not accrue" until state court proceedings terminated), and in the Connecticut Supreme Court's

previously-mentioned *Melillo* decision (plaintiffs were "not entitled to consideration of [a Fifth Amendment taking claim] because of the existence of a legally sufficient procedure, under [the Takings Clause of the Connecticut Constitution"]), 732 A.2d at 143 n.28.

The Connecticut Supreme Court opinion, however, affirmatively violated this Court's Fifth Amendment Takings Clause jurisprudence in several ways. It rejected the principle that decisions of this Court interpreting the Fifth Amendment furnish minimum national standards for the analysis and adjudication of takings claims brought in state court under available state remedies. It dismissed as irrelevant, without explanation, the three-factor *Penn Central* test, *First English*'s recognition of temporary takings, and the *Lucas* categorical formulation of a taking resulting from a total loss of economic use. Because of its application of state law principles, the Connecticut court found it *unnecessary* to analyze the economic impact of the Service's action on the Santini property; this inquiry, of course, constitutes the first factor of the *Penn Central* analysis and the starting point of the *Lucas* test. The state court declined to employ the principle of *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960), that the purpose of federal Takings Clause is to avoid having an individual bear an economic burden that should, in fairness, be borne by the general public. In addition, the Connecticut opinion employed a governmental "intent to condemn standard," in direct contradiction to such cases as *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (government's intent not relevant to takings analysis). Further, it stated in *dictum*, that *all* takings claims require evidence of complete economic loss, thereby contravening several decisions of this Court that recognize taking claims based on partial economic loss. Finally, by employing an intent standard, the Connecticut court effectively eliminated inverse condemnation claims in Connecticut because an inverse taking, by definition, arises from a total or severe impact on economic use that has occurred *without* intent to formally condemn.

Thus, it is beyond argument that Santini could not have brought his Fifth Amendment claim in federal court, but when Santini litigated his taking claim in state court under state law, he most assuredly did not receive, expressly or implicitly, an adjudication that was consistent with this Court's Fifth Amendment standards.

Worse, the federal district court dismissed Santini's Fifth Amendment Takings Clause claim for lack of jurisdiction. Although the Second Circuit reversed the jurisdictional dismissal and addressed the merits, it took Santini ten years and hundreds of thousands of dollars to achieve that result. It should also be noted that in the Second Circuit, Santini was forced to devote most of his appeal brief to the jurisdictional issues, and thus when the Second Circuit *sua sponte* reached and decided the merits, it did so based on briefs that barely touched upon the merits (and as a likely result, it misstated some critical testimony and misapprehended a portion of Santini's theory of liability for a taking).

In light of his experience as a litigant, Santini respectfully offers the following observations and prescriptions for resolving the issue before this Court:

1. The root of the problem arising from *Williamson County*'s state court requirement is whether a litigant proceeding in state court as required by this Court's 1985 decision is required to raise, permitted to raise, or prohibited from raising a Fifth Amendment taking claim. In interpreting *Williamson County*, the federal courts have

been inconsistent. Compare, for example, this Court's statement in *Del Monte Dunes* that a federal taking claim "does not accrue" until state proceedings have been completed, with its opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606, 615 (2001), in which the Rhode Island courts addressed a taking claim brought under the federal constitution, but this Court on appeal had no comment on that pleading choice.

2. The *Williamson County* state court requirement is based on the erroneous premise that a Fifth Amendment claim for a taking without just compensation does not come into existence until a state court has denied a taking claim brought under state law. If the operative facts give rise to a justiciable taking claim under state law, they must create at the same time a Fifth Amendment taking claim. The pleading basis and the forum may be different, but the "claim" necessarily exists in both forums.

3. The *Williamson County* state court requirement should be overruled because (a) it is based on an erroneous assumption regarding when a federal taking claim accrues, as explained above; (b) it has caused confusion and inconsistency for litigants and judges; (c) it requires property owners to engage in lengthy, expensive, sequential litigation in order to vindicate a federal civil right; and (d) at least in those states where the state courts refuse to adhere to this Court's takings jurisprudence as a minimum standard of civil rights protection, it *prohibits* property owners *ever* from obtaining an adjudication of their Fifth Amendment rights, as the *Santini* case illustrates.

4. The Ninth Circuit's "functional equivalent" approach is not a viable procedure, because it not only

preserves the requirement of sequential litigation, but potentially lengthens that litigation by requiring the first issue in any subsequent federal case to be whether the state courts have provided an adjudication that is equivalent to federal standards.

5. In the alternative, if the *Williamson County* state court requirement is not overruled, the *amici curiae* respectfully suggest that this Court clarify that:

- this Court's takings jurisprudence furnishes minimum, national standards for the adjudication of a taking claim under state law;
- an *England* reservation or similar procedure is unnecessary (because the federal claim does not yet exist); and
- the *Rooker-Feldman* doctrine, claim preclusion, and issue preclusion are inapplicable.[5]

In other words, if the state court requirement is to be preserved, then it should be clear that minimum federal standards apply, and the right to bring a subsequent federal claim is not procedurally extinguished, limited, or burdened by satisfying that requirement.

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[5]One exception that might be recognized is, that where a state court has resolved a takings case on a state law ground (such as lack of a protected property interest) that effectively precludes adjudication of a Fifth Amendment claim, a federal court may decline jurisdiction under *Rooker-Feldman* because reopening the state court judgment would be a necessary predicate to relief in federal court. *See, e.g., Snider v. Excelsior Springs*, 154 F.3d 809, (8th Cir. 1998) (state proceedings unrelated to taking claims had extinguished property interest).

CONCLUSION

Taking cases are difficult to litigate and difficult to win. With the daunting substantive hurdles, restrictions, and standards that takings plaintiffs must overcome, it is apparent that overruling the *Williamson County* state court requirement, or clarifying it as suggested above, will not "open the floodgates" to the federal courts. Rather, those with a viable taking claim will decide whether and how to pursue it based on an assessment of its merits, rather than the specter of an endless procedural gauntlet.

Respectfully submitted,

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No. 04-340

IN THE

Supreme Court of the United States

SAN REMO HOTEL L.P., *et al.*,
Petitioners,
v.
CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, CHAMBER OF COMMERCE OF THE UNITED STATES, ALLIED EDUCATIONAL FOUNDATION, AMERICAN ASSOCIATION OF SMALL PROPERTY OWNERS, NATIONAL TAXPAYERS UNION, ANTHONY PALAZZOLO, PROPERTY RIGHTS FOUNDATION OF AMERICA, SOUTH CAROLINA LANDOWNERS ASSOCIATION, SMALL PROPERTY OWNERS ASSOCIATION, SMALL PROPERTY OWNERS OF SAN FRANCISCO INST., AND UNITED LOT OWNERS OF CAMBRIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Did the U.S. Court of Appeals for the Ninth Circuit err in holding, contrary to a holding of the U.S. Court of Appeals for the Second Circuit, that issue preclusion bars consideration of a claim under the Fifth Amendment's Takings Clause where: (1) a state court has rejected the plaintiffs' analogous state-law cause of action; and (2) the plaintiffs filed their state court action for the sole purpose of ripening their Takings Clause claim, as required by this Court's decision in *Williamson County Planning Comm'n v. Hamilton Bank of Johnson City*?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. The Ninth Circuit's Decision Threatens to Prevent Takings Clause Claimants from Ever Having Their Day in Court 12

II. Application of Issue Preclusion Is Inconsistent with the Theory Underlying *Williamson County* 19

III. The Ninth Circuit's Decision Is Contrary to Well-Established Issue Preclusion Precedents from Both This Court and the California Courts 22

CONCLUSION 27

TABLE OF AUTHORITIES

Cases: **Page**

Allen v. McCurry, 449 U.S. 90 (1980) 14, 18, 26
American Continental Ins. Co. v. American Cas. Co., 86 Cal.App. 4th 929 (2001) 25
Blumenthal Inv. Trusts v. City of West Des Moines, 636 N.W.2d 255 (2001) 16
Bd. of Regents v. Tomanio, 446 U.S. 478 (1980) 17
Breneric Associates v. City of Del Mar, 69 Cal. App. 4th 166 (1998) 16
Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226 (1897) 21, 22
DLX, Inc. v. Kentucky, 381 F.3d 511 (6th Cir. 2004) 13, 25
Dodd v. Hood River County ("Dodd I"), 59 F.3d 852 (1995) 24
Dodd v. Hood River County ("Dodd II"), 136 F.3d 1219 (9th Cir.), *cert. denied*, 525 U.S. 923 (1998) 25
Dolan v. City of Tigard, 512 U.S. 374 (1994) 7, 10
Droste v. Bd. of County Comm'rs, 85 P.3d 585 (Colo. App. 2003) 16
Eberle v. Dane County Bd. of Adjustment, 227 Wis.2d 609 (1999) 16
Ehrlich v. City of Culver City, 12 Cal.4th 854 (1996) 6, 7
England v. Louisiana State Bd. of Medical Advisors, 375 U.S. 411 (1964) 6, 9, 13, 14

Page

Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299 (11th Cir. 1992) 13
Haring v. Prosise, 462 U.S. 306 (1983) 17, 18, 23
Levatte v. City of Wichita Falls, 144 S.W.3d 218 (Tex. App. 2004) 16
Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999) 16
Melillo v. City of New Haven, 249 Conn. 138 (1999) 17
Mitchum v. Foster, 407 U.S. 225 (1972) 14
Monroe v. Pape, 365 U.S. 167 (1961), *overruled in part on other grounds, Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978) 16
Montana v. United States, 440 U.S. 147 (1979) 23
Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 7, 10
Phillips v. Washington Legal Found., 524 U.S. 156 (1998) 21
Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) 5, 8, 14
San Remo Hotel v. City and County of San Francisco, 145 F.3d 1095 (9th Cir. 1998) 5
Santini v. Connecticut Hazardous Waste Mgmt. Serv., 342 F.3d 118 (2d Cir. 2003) 9, 16, 17, 25
Sintra v. City of Seattle, 119 Wn.2d 1, 829 P.2d 765 (1992) 16

Page

Stolz v. Bank of America,
15 Cal. App. 4th 217 (1993) 24
United States v. Moser,
266 U.S. 236 (1924) 23
Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155 (1980) 21
Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,
473 U.S. 172 (1985) ..... *passim*

Constitutional Provisions, Statutes, and Rules:

U.S. Const., amend. v, Takings Clause ..... *passim*

42 U.S.C. § 1983 ..... 14, 17, 18

Fed.R.Civ.P. 12(b)(6) 8

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states, including many in the State of California.[1] WLF has appeared before this Court in numerous cases involving claims arising under the Fifth Amendment's Takings Clause. *See, e.g.*, *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *McQueen v. South Carolina Coastal Council*, 354 S.C. 142, *cert. denied*, 124 S. Ct. 466 (2003). WLF filed briefs in this case when it was before the California Supreme Court and in support of the petition for certiorari.

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and professional organizations of every size, in every sector of business, and from every region of the country, and has several thousand members in California. An important function of the Chamber is to represent the interests of its members in court on issues of national concern to the business community.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief. Letters of consent to this filing have been lodged with the Court.

The American Association of Small Property Owners (AASPO) is a nonpartisan, nonprofit § 501(c)(3) corporation. Since 1993, AASPO has been working for the right of small property owners to prosper freely and fairly -- to make possible the American dream of building wealth though real estate. Based in Washington, DC, AASPO has chapters or affiliates in more than 25 states.

The National Taxpayers Union (NTU) is a nonprofit citizen group founded in 1969 to work for lower taxes, smaller government, and more accountability from elected officials. Headquartered in Alexandria, Virginia, NTU has 350,000 members nationwide.

Anthony Palazzolo is a Rhode Island property owner. He was the petitioner in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), a case that decided important issues under the Fifth Amendment's Takings Clause. He believes that the hostile treatment his Takings Clause claims received in Rhode Island state courts well illustrates the need to preserve a federal forum in which such claims can be raised.

The Property Rights Foundation of America, Inc. (PRFA) is a nonprofit organization based in New York State and dedicated to providing information and education and promoting understanding about the fundamental constitutional rights of America's citizens, especially the right to own and use private property. PRFA is a volunteer, grass-roots organization committed to assisting citizens, policy-makers, and those in the media concerned with protecting the rights of property owners against government abuse.

The South Carolina Landowners Association, Inc. (SCLA) is a statewide nonprofit grassroots organization dedicated solely to the promotion and protection of property

rights through research, analysis, and education. SCLA joins this brief because it maintains that a property owner should not be barred from raising Fifth Amendment Takings Clause claims solely because similar claims under state law have been previously rejected.

The Small Property Owners Association (SPOA) is a nonprofit § 501(c)(4) organization with 3,000 members in the Greater Boston area and Massachusetts, representing the interests of small-scale rental property owners. Begun in 1987 in Cambridge under the nation's then most stringent rent control system, SPOA grew rapidly and, failing at local reform, succeeded in a 1994 referendum that repealed rent control in Massachusetts.

The Small Property Owners Institute of San Francisco is a nonprofit organization dedicated to the fair treatment of small property owners in San Francisco through legal advocacy, education, and research. It was recently founded to build on the prior efforts of Small Property Owners of San Francisco (SPOSF), which has brought major lawsuits against the City of San Francisco to protect the rights of small property owners. *E.g., Tom v. San Francisco,* 120 Cal. App. 4th 674 (2004) (successful challenge to ordinance prohibiting property owners from living in their own properties). SPOSF has also filed *amicus* briefs in the California Supreme Court. *E.g., Drouet v. Superior Court*, 31 Cal.4th 583 (2003). Most recently, the Institute filed an *amicus* brief with this Court in *Lingle v. Chevron,* No. 04-163. The Institute also conducts seminars designed to help small property owners understand and protect their rights, publishes a monthly newsletter, works to alert San Francisco's residents to the societal costs of restrictive regulations, and will conduct research projects to demonstrate the effect of the local regulations on housing in the city.

United Lot Owners of Cambria is an organization of small property owners in the community of Cambria, California whose properties are the subject of an anti-growth inspired building moratorium. The organization is concerned about the government's increasing propensity to enact stifling regulations on private property in the name of the common good, but then to refuse to reimburse the individual private property owner for the economic impact of the loss of use caused by the regulations.

STATEMENT OF THE CASE

Petitioners are the owners of a building located in San Francisco (the San Remo Hotel) that has been operated as a tourist hotel since the 1950s. The record is uncontested that in the decades preceding this litigation, the great majority of the Hotel's 62 rooms were rented primarily to tourists, while about 10 of the rooms were rented on a longer-term basis to residential tenants.

The City of San Francisco adopted ordinances in 1981 and 1990 (the "Hotel Ordinance") that sought to induce hotel owners to reserve units for residential tenants, in order to prevent deterioration of the residential housing stock. San Francisco officials informed Petitioners that, pursuant to the 1990 Hotel Ordinance and related zoning laws, they were no longer permitted to rent *any* of their 62 units to tourists without first obtaining a "conditional use permit."[2] Because that determination threatened the destruction of their tourist hotel

[2] The California Supreme Court later determined, as a matter of state law, that San Francisco had erred in this respect. That court determined that tourist use of the Hotel's rooms was a "permitted conditional use" – and thus Petitioners did not need a permit to continue to rent to tourists at historic levels. Pet. App. 124a-127a & n.10.

business, Petitioners in 1990 applied for a permit that would allow them to rent all 62 units to tourists. In 1993, the San Francisco Planning Commission granted the requested permit, conditioned on Petitioners' payment of $567,000 -- supposedly to compensate San Francisco for the loss of residential units occasioned by the grant of the permit. Petitioners paid the exaction under protest.

San Remo I. Petitioners' 1993 federal court complaint challenged San Francisco's imposition of a $567,000 exaction on several grounds, including that it violated the Fifth Amendment's Takings Clause, both on its face and as applied. Following the district court's 1996 grant of summary judgment to Respondents on all claims, Petitioners appealed. The Ninth Circuit affirmed dismissal of the as-applied takings claim, citing *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), as authority for its finding that the claim was unripe -- because Petitioners had not yet sought "just compensation" from the California courts for the alleged taking. *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998) ("*San Remo I*"). The court also deemed the facial challenge unripe to the extent that it alleged that San Francisco's actions denied Petitioners all economically viable use of their property. *Id.* The court acknowledged that the facial challenge *was* ripe to the extent that it alleged that the 1990 Hotel Ordinance did not substantially advance legitimate state interests, but it invoked *Pullman* abstention[3] to defer consideration of that claim until after analogous state-law issues could be considered by state courts.

[3] *See Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941).

San Remo II. Petitioners filed an inverse condemnation claim in state court, arguing that article 1, section 19 of the California Constitution required San Francisco to provide compensation for the $567,000 confiscated from them. Petitioners did *not* raise any federal claims in this state-court action; indeed, they specifically reserved claims under the Takings Clause until their expected return to federal court, citing *England v. Louisiana State Bd. of Medical Advisors*, 375 U.S. 411 (1964).

The California Court of Appeal reversed the trial court's grant of San Francisco's demurrer to the state constitutional claims. In March 2002, the California Supreme Court voted 4-3 to reverse the court of appeal and sustain the demurrer. Pet. App. 106a-194a ("*San Remo II*"). The court stated that San Francisco had erred in informing Petitioners that they would need to obtain a "conditional use permit" if they wished to continue renting any of their 62 rooms to tourists. *Id.* at 124a-127a & n.10. The court nonetheless held that that error did not affect the state constitutional issue because Petitioners ultimately applied for a permit to rent *all* of their units to tourists, not simply to rent to tourists at historic levels. *Id.* at 122a-130a. Because *some* units had been rented to residential tenants during the preceding decades, the court explained, Petitioners were properly required under state and local law to seek a permit if they wished to cease renting to residential tenants. *Id.*

The court next determined that for purposes of Petitioners' state constitutional claim, the $567,000 exaction should not be subject to "heightened scrutiny." *Id.* at 130a-144a. The court had held in *Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996), that the monetary exaction imposed in that case should be subject to "heightened scrutiny" under the state

constitution.[4] But the court held that *Ehrlich*'s heightened scrutiny standard applies only when an exaction is imposed on an *ad hoc* basis by a government administrator to whom discretionary powers have been delegated. When the exaction is imposed pursuant to a legislative mandate that applies "without discretion or discrimination" to an entire class of property owners, there is no reason to apply *Ehrlich*'s heightened scrutiny, the court held. *Id.* at 137a-138a. The court instead applied "the more deferential constitutional scrutiny applicable to land use regulations made generally applicable by legislative enactment to a class of property owners." *Id.* at 137a.

Applying that deferential scrutiny, the court held that the Hotel Ordinance did not violate the state constitution, either on its face or as applied to Petitioners (in the form of a $567,000 exaction). *Id.* at 144a-155a. The court held that the housing replacement fees imposed by the Hotel Ordinance "bear a reasonable relationship" to the loss of residential housing when residential units are taken off the market and thus were not facially invalid. *Id.* at 144a. The court also held that the $567,000 exaction imposed on Petitioners bore a reasonable relationship to the loss of residential units as a result of conversion of the San Remo Hotel to an entirely tourist hotel. *Id.* at 152a-155a.

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[4] The court said that the "heightened scrutiny" it imposed in *Ehrlich* was similar to the level of scrutiny mandated by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), in cases in which a government conditions approval of a development permit on a landowner's agreement to dedicate a portion of his property to the government. *Id.* at 134a-137a. In *Nollan/Dolan*, the Court held that such conditions violate the Fifth Amendment's Takings Clause unless there is a "rough proportionality" between the exaction and the projected impact of the proposed development. *Dolan*, 512 U.S. at 386.

Justices Baxter, Chin, and Brown dissented. Justices Baxter and Chin argued that Petitioners should not have been required to pay an exaction based on the conversion of all 62 rooms to tourist use when (as all members of the court agreed) Petitioners had adequately alleged a right under state law to use as many as 53 of the 62 rooms for tourist rentals without obtaining a conditional use permit. *Id.* at 155a-174a. Justice Brown argued that the Hotel Ordinance was facially unconstitutional and thus that the entire $567,000 exaction constituted a taking in violation of the state constitution. *Id.* at 175a-194a. She argued that Petitioners did not cause, and thus are under no obligation to use their property to alleviate, San Francisco's low-income housing shortage. *Id.* at 177a. She argued that the costs of alleviating that shortage should properly be borne by all citizens rather than by a small group not responsible for its creation. *Id.* at 176a-177a.

All seven justices were in agreement that Petitioners had not raised, and that the court had not addressed, any federal constitutional issues. *Id.* at 107a n.1 (majority opinion) ("No federal question has been presented or decided in this case."); *id.* at 170a (Baxter, J., dissenting) ("Plaintiffs have reserved their federal claims and, if rebuffed here, will resume their federal litigation which is now subject to *Pullman* abstention."); *id.* at 194a (Brown, J., dissenting) ("I dissent and hope the plaintiffs find a more receptive forum in the federal courts."). None of the justices gave any indication that they thought that California law governing claim and/or issue preclusion would bar Petitioners from fully litigating their Takings Clause claim in federal court.

San Remo III. Petitioners then returned to federal court with their Takings Clause claims. In orders issued in October 2002 and April 2003, the district court granted San Francisco's motion to dismiss the complaint under Fed.R.Civ.P. 12(b)(6).

It held that: (1) the facial challenges to the Hotel Ordinance and San Francisco zoning law were time barred; and (2) all of Petitioners' claims had already been rejected by the California Supreme Court and thus were barred by the doctrine of issue preclusion. *Id.* at 53a-105a; 22a-52a.

The Ninth Circuit affirmed, finding that issue preclusion required dismissal. *Id.* at 3a-21a ("*San Remo III*").[5] The court held that although Petitioners' *England* reservation "was sufficient to avoid the doctrine of *claim* preclusion," such a reservation "does not enable them to avoid preclusion of issues actually litigated in the state forum." *Id.* at 13a, 14a. Relying on its prior decisions, the court held that issue preclusion bars litigation of a Takings Clause claim in federal court after the property owner has litigated and lost a state-law takings claim in state court, "if the state courts would give preclusive effect to the judgment of the state court and the state and federal substantive law of takings are equivalent." *Id.* at 16a.[6]

The appeals court then undertook a comparison of the California Supreme Court's interpretation of the state constitution's takings provision with the Ninth Circuit's interpretation of the Takings Clause. *Id.* at 17a-20a. Finding

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[5] The court "express[ed] no opinion on [the district court's] alternate holding regarding the statute of limitations." *Id.* at 11a.

[6] The court recognized that its holding conflicted with a Second Circuit decision on this point. *Id.* at 14a-15a (citing *Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003)). Although recognizing that *Santini* had "held that a plaintiff who must proceed to state court to ripen his takings claim under *Williamson County* should not then be precluded" from raising a Takings Clause claim in federal court, "so long as the plaintiff reserved his claim under *England*," the court held that it was bound by circuit precedent to reject *Santini*'s approach. *Id.* at 15a.

that the California Supreme Court's analysis was "equivalent to the approach taken in this circuit" -- particularly with respect to the *Nollan/Dolan* "rough proportionality" test -- the Ninth Circuit held that Petitioners' Takings Clause claims "are barred from litigation under the doctrine of issue preclusion." *Id.* at 19a, 21a.

This Court granted review, limited to the question of whether issue preclusion bars federal courts from considering Petitioners' Takings Clause claim. The Court declined to review a second question: whether *Nollan/Dolan*'s "rough proportionality" test is applicable to the exaction imposed by San Francisco.

SUMMARY OF ARGUMENT

This case raises property rights issues of exceptional importance. Petitioners contend that San Francisco violated their rights under the Fifth Amendment's Takings Clause by taking $567,000 from them without providing just compensation. After 11 years of attempting to litigate that claim in federal court, Petitioners have now been told by the Ninth Circuit that they will never be permitted to do so *in any court*. The Ninth Circuit held that the doctrine of issue preclusion bars Petitioners from litigating their claim in federal court, even though the issues raised by their Takings Clause claim have not been adjudicated by any other court.

The Ninth Circuit decision is an unprecedented expansion of the issue preclusion doctrine, unwarranted by either this Court's precedents or common law understandings of that doctrine. Moreover, the decision threatens to undermine the ability of Takings Clause claimants ever to have their day in court. As Petitioners' brief well illustrates, the Ninth Circuit decision -- when read in conjunction with this

Court's decision in *Williamson County* -- creates a trap that will ensnare even the most wary of claimants. *Williamson County* held that a Takings Clause claim is not ripe until a property owner has sought, and been denied, compensation from a state court pursuant to state-law remedies. But according to the Ninth Circuit, the very event that this Court viewed as a condition precedent to bringing a Takings Clause claim -- the rejection of compensation claims by a state court -- serves to bar a property owner from ever raising his Takings Clause claim in federal court, regardless whether (as here) he explicitly reserves his right to press his federal claims in subsequent federal proceedings. Indeed, in the many states (such as California) that will not permit Takings Clause claims to be raised in state court until after state-law compensation claims have been denied, the Ninth Circuit ruling prevents property owners from raising Takings Clause claims in *any* court, whether state or federal.

The Ninth Circuit's decision is clearly at odds with this Court's precedents. Those precedents indicate that issue preclusion serves to bar litigation of an issue only when the *precise* issue has already been decided in a prior proceeding. Yet, there is no dispute that none of the issues raised by Petitioners in their federal court proceedings were ever precisely raised or decided by the California courts. The Ninth Circuit held merely that the California Supreme Court's determination of the state takings claims was "an equivalent determination" of Petitioners' federal Takings Clause claims. Pet. App. 17a. There is no basis under state or federal law for precluding review of a federal issue simply because a previously decided state law issue is deemed in some sense to be "equivalent."

In particular, applying issue preclusion in this case is inconsistent with the Court's rationale in *Williamson County*.

The Court in that decision did *not* simply require property owners to seek Takings Clause relief in the state courts as a means of exhausting remedies prior to entering federal court. Rather, *Williamson County* reasoned that *there has been no Takings Clause violation* by a State or local government until a property owner has availed itself of "adequate" state court remedies and "been denied just compensation." *Williamson County*, 473 U.S. at 195. Accordingly, when a Takings Clause claimant comes to federal court after being denied compensation in state court, the claimant of necessity is asserting that the state court decision was an integral part of the constitutional violation. Under those circumstances, it would be anomalous for federal courts to provide preclusive effect to a state court decision that itself is an essential component of the alleged constitutional violation.

The decision below threatens to undermine the ability of citizens to vindicate their Fifth Amendment rights. Even if there may be circumstances in which issue preclusion can have some application in a Takings Clause case, this is not such a case. The unprecedented and sweeping manner in which the Ninth Circuit has applied that doctrine in this case cries out for reversal.

ARGUMENT

I. The Ninth Circuit's Decision Threatens to Prevent Takings Clause Claimants from Ever Having Their Day in Court

The Ninth Circuit held that the doctrine of issue preclusion barred Petitioners from raising their Takings Clause claims in federal court, even though: (1) Petitioners initially (and properly) filed suit in federal court; (2) Petitioners later filed suit in the California courts, as they were required to do by the federal court; (3) Petitioners made clear at all times in

the California court proceedings that they were *not* raising their Takings Clause claims in those proceedings but rather were reserving those claims for later federal court proceedings; and (4) the California courts acknowledged that no federal claims had been raised or were being decided and gave no indication that they believed that California issue preclusion rules would bar a later suit (in either federal or state court) raising Takings Clause claims.[7]

By relying on the doctrine of issue preclusion to bar Petitioners' claims, the Ninth Circuit has applied that doctrine in an unprecedented manner, and in a manner that threatens to

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[7] In so ruling, the Ninth Circuit acknowledged that its ruling directly conflicts with the Second Circuit's *Santini* decision but held that it was bound by circuit precedent to reject *Santini*'s approach. Pet. App. 15a. The decision below also conflicts with *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992), which held that issue preclusion does not bar property owners from raising a Takings Clause case in federal court -- even though they have already lost a state-law takings claim in state court and even though "the federal takings claim is essentially the same claim as that raised in the Florida law inverse condemnation action" -- so long as the owner has explicitly reserved in the state action his right to raise his federal claims in a later federal court action.

Amici note that there is one relevant issue on which the federal courts appear to be in complete agreement: *claim preclusion* does not bar filing Takings Clause claims in federal court under the facts of this case. So long as the property owner makes an *England* reservation in state court -- thereby making clear his intent not to pursue Takings Clause claims in state court but rather to reserve those claims for a later federal court action -- the appeals courts (including the Ninth Circuit) unanimously agree that claim preclusion does not bar the later action. Pet. App. 13a; *see DLX, Inc. v. Kentucky*, 381 F.3d 511, 522-23 (6th Cir. 2004). The correctness of those claim preclusion holdings is not at issue here; the Ninth Circuit explicitly noted that San Francisco "does not dispute that the plaintiffs' *England* reservation was sufficient to avoid the doctrine of *claim* preclusion." Pet. App. 12a-13a.

deprive property owners of all opportunity to raise Takings Clause claims.

The Ninth Circuit was correct in holding that federal constitutional claims brought in federal court are not categorically exempt from application of the issue preclusion doctrine. As the Court explained in *Allen v. McCurry*, 449 U.S. 90, 97-98 (1980):

> [N]othing in the language of [42 U.S.C.] § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion. * * * Section 1983 creates a new federal cause of action. It says nothing about the preclusive effect of state-court judgments.

But the Ninth Circuit read far too much into that decision. *Allen* said merely that the lower court had erred in finding issue preclusion categorically inapplicable to § 1983 claims, and its remand explicitly refrained from deciding whether issue preclusion applied in that case or any other specific case. *Id.* at 95 n.7 ("It must be emphasized that the question whether any exceptions or qualifications within the bounds of that doctrine might ultimately defeat a collateral estoppel defense in this case is not before us."). One exception/qualification explicitly cited by *Allen* is highly pertinent to this case:

> In the event that a § 1983 plaintiff's federal and state-law claims are sufficiently intertwined that the federal court abstains from passing on the federal claims without first allowing the state court to address the state-law issues, the plaintiff can preserve his right to a federal forum for his federal claims by informing the state court of his

> intention to return to federal court on his federal claims following litigation of his state claims in state court.

Id. at 85 n.7 (citing *England*, 375 U.S. 411). Yet, the Ninth Circuit held that issue preclusion required dismissal of Petitioners' claims, despite: their initial filing in federal court; *San Remo I*'s invocation of *Pullman* abstention to send Petitioners to state court; and Petitioners' subsequent assertion of an *England* reservation before the California courts.

That wildly expansive interpretation of issue preclusion is particularly troubling because it cuts against a basic principle undergirding *England*: in general, those asserting federal constitutional rights ought to have an opportunity to press those claims in a federal forum. *See, e.g., England*, 375 U.S. at 415 ("There are fundamental objections to any conclusion that a litigant who has invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without consent and through no fault of his own, to accept instead a state court's determination of those claims."). *See also Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of state law."). Congress has made very clear that it sought to make the federal courts the guardians of federal constitutional rights:

> It is abundantly clear that one reason [42 U.S.C. § 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the

Fourteenth Amendment might be denied by the state agencies.

Monroe v. Pape, 365 U.S. 167, 180 (1961), *overruled in part on other grounds, Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978).

Furthermore, the result of the Ninth Circuit's decision is tc preclude direct consideration of Takings Clause claims *even in state court*, both in California and in the many other states that deem Takings Clause claims unripe in state court until after a landowner has been denied relief under state-law takings claims. *See Breneric Associates v. City of Del Mar*, 69 Cal. App. 4th 166, 188 (1998) (citing *Williamson County*, court holds that Takings Clause claim was unripe because state courts had not yet denied landowners' state-law claims for just compensation). *Accord, Droste v. Bd. of County Comm'rs*, 85 P.3d 585, 591 (Colo. App. 2003); *Blumenthal Inv. Trusts v. City of West Des Moines*, 636 N.W.2d 255, 262-64 (Iowa 2001); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 929 n.2 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999); *Levatte v. City of Wichita Falls*, 144 S.W.3d 218, 224 (Tex. App. 2004); *Sintra v. City of Seattle*, 119 Wn.2d 1, 20, 829 P.2d 765 (1992); *Eberle v. Dane County Bd. of Adjustment*, 227 Wis.2d 609, 638-39, 595 N.W.2d 730 (1999). If the Ninth Circuit's view of issue preclusion is correct, then once such state-law claims have been denied by the state courts, landowners would be barred from raising their Takings Clause claims even in California courts.

It was precisely such concerns that led the Second Circuit in *Santini* to find both claim and issue preclusion inapplicable under these circumstances. *San.ini*, 342 F.3d at 128-130. *Santini* involved landowners who had litigated a state-law action in state court in Connecticut before filing a Takings

Clause action in federal court. Similar to the California courts, the Connecticut courts do not permit landowners to raise Takings Clause claims in state court until after they have litigated and lost a claim for compensation under state law. *Melillo v. City of New Haven*, 249 Conn. 138, 154 n.28 (1999) (cited by *Santini*, 342 F.3d at 127). The Second Circuit held:

> [W]e deem it appropriate to permit parties like *Santini*, who litigate state-law takings claims in state court involuntarily, to reserve their federal takings claims for determination by a federal court. It would be both ironic and unfair if the very procedures that the Supreme Court [in *Williamson County*] required Santini to follow before bringing a Fifth Amendment takings claim - a state-court inverse condemnation action - also precluded Santini from ever bringing a Fifth Amendment claim.

Santini, 342 F.3d at 130.

As noted below, the Ninth Circuit applied issue preclusion in a manner wholly inconsistent with traditional rules governing issue preclusion in California and elsewhere. But even if there were no inconsistency, the Court should not countenance use of preclusion rules to prevent a litigant from raising a federal constitutional claim in *any* forum. This Court has long recognized that "42 U.S.C. § 1988 authorizes federal courts, in an action under § 1983, to disregard an otherwise applicable state rule of law if the state policy is inconsistent with the federal policy underlying § 1983." *Haring v. Prosise*, 462 U.S. 306, 314 (1983) (citing *Board of Regents v. Tomanio*, 446 U.S. 478 (1980)). In *Haring*, the Court held that a convicted drug dealer's § 1983 federal action against police

officers who searched his apartment[8] was not barred by issue preclusion, despite the dealer having pleaded guilty to drug charges in Virginia state court without contesting the admissibility of damaging evidence obtained during the subsequently-contested search. The Court held that regardless whether Virginia courts would have applied issue preclusion to bar the drug dealer's Fourth Amendment claims, "Adoption of [the police officers'] rule of preclusion would threaten important interests in preserving federal courts as an available forum for the vindication of constitutional rights." *Id.* at 322. The Court explained:

> Not only have [the police officers] failed to advance any compelling justification for a rule confining the litigation of constitutional claims to a state forum, but such a rule would be wholly contrary to one of the central concerns which motivated the enactment of § 1983, namely, the "grave congressional concern that the state courts had been deficient in protecting federal rights." *Allen v. McCurry*, 449 U.S. at 98-99.

Id. at 323.

In sum, the decision below should be reversed because it threatens to prevent Takings Clause claimants from ever having their day in federal court, or even in a state court.

[8] The drug dealer contended that the police violated his Fourth Amendment rights by searching his apartment without first obtaining a warrant.

II. Application of Issue Preclusion Is Inconsistent with the Theory Underlying *Williamson County*

Application of issue preclusion to bar federal court consideration of federal constitutional claims is particularly inappropriate where, as here, the plaintiff alleges that the very state court finding for which preclusive effect is sought was itself a violation of his constitutional rights. Petitioners contend that their rights under the Takings Clause were violated when the California Supreme Court denied their request for compensation. There can be no basis for granting preclusive effect to the findings of the very state governmental body whose ruling gave rise to Petitioner's Fifth Amendment claim.

This Court's decision in *Williamson County* makes clear that a state court's denial of a request for compensation is an integral part of any Takings Clause violation. As the Court explained:

> The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. * * * Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking. * * * [I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Williamson County, 473 U.S. at 194-95 (internal quotations omitted).

Accordingly, when a Takings Clause claimant comes to federal court after being denied compensation in state court, the claimant of necessity is asserting that the state court decision was an integral part of the constitutional violation. In this case, Petitioners do not simply allege that San Francisco's conduct (*i.e.*, its imposition of a $567,000 exaction as a condition for granting a permit to operate a tourist hotel) standing by itself amounted to a federal constitutional violation. Rather, they contend (per *Williamson County*) that the Takings Clause violation became complete only when the California Supreme Court denied them compensation for the exaction. Under those circumstances, it is anomalous for the federal courts to provide preclusive effect to the findings of the very court decision that gives rise to the alleged federal constitutional violation.[9]

Williamson County did not hold that Takings Clause claims could never be filed in federal court. To the contrary, it clearly contemplated that once such claims have come into being -- by virtue of a state court's allegedly wrongful denial of the property owner's requests filed pursuant to the State's "adequate procedure" for obtaining compensation -- the Takings Clause claims could be pursued freely in federal court.

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[9] *Williamson County* makes clear that for purposes of establishing ripeness, differences among various levels of a State government are to be disregarded. Thus, for example, the ripeness requirements apply when property is taken by a city or county government, even though the "adequate procedure for seeking just compensation" is provided in courts operated by the State government. *Id.* at 196 (finding that Tennessee state courts provide an adequate procedure for seeking compensation for a Tennessee county's alleged taking of private property). Similarly, *Williamson County* contemplates that if the state court later fails to provide the "just compensation" required by the Fifth Amendment, that failure is attributable to the city or county government that initially took the property in question.

Yet the issue preclusion rule adopted by the Ninth Circuit (consideration of Takings Clause claims are precluded if the state court denied compensation under an analogous State law cause of action) would effectively prevent all federal court consideration of Takings Clause claims, except in those rare instances in which the state courts decline to consider a compensation claim. Issue preclusion has never been understood to apply under such circumstances. The Restatement of the Law, Second, Judgments provides:

> A determination of an issue by a state court does not preclude relitigation of that issue in federal court if according preclusive effect to the determination would be incompatible with a scheme of federal remedies which contemplates that the federal court may make an independent determination of the issue in question.

Restatement 2d of Judgments, § 86(2). For the reasons explained above, according preclusive effect to the California Supreme Court's rejection of Petitioners' state-law takings claim "would be incompatible with" the scheme of federal remedies contemplated by *Williamson County*.

The Court has repeatedly rejected claims that it should defer to state court findings that Takings Clause claimants lack compensable property rights. *See, e.g., Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998) ("[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law."); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). Indeed, the very first decision of this Court that applied the Takings Clause to the states -- *Chicago, Burlington and Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897) -- made clear that the judicial branch of State government is as fully

subject to Takings Clause constraints as are other portions of State government. *See, e.g.*, 166 U.S. at 241:

> [A] judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States [incorporating the provisions of the Fifth Amendment], and affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument.

Because Petitioners have alleged that the California Supreme Court's denial of their compensation claim gave effect to San Francisco's violation of their Fifth Amendment rights, it is particularly inappropriate for the federal courts to invoke issue preclusion to defer to the California Supreme Court's finding that no compensable taking occurred. This is not an instance in which, as alleged by San Francisco, a litigant seeks a "second bite at the apple" by litigating in federal court an issue that was considered and rejected by the state courts. Rather, the federal courts must determine an issue that the California courts did not and could not decide: whether the California courts' denial of Petitioners' compensation claims gave effect to a violation of Petitioners' Fifth Amendment rights.

III. The Ninth Circuit's Decision Is Contrary to Well-Established Issue Preclusion Precedents from Both This Court and the California Courts

The Ninth Circuit's decision should be reversed for the additional reason that it is so clearly at odds with issue

preclusion precedents from both this Court and the California courts. Those precedents indicate that issue preclusion serves to bar litigation of an issue only when the *precise* issue has already been decided in a prior proceeding. Yet, the Ninth Circuit invoked issue preclusion here even though there is no dispute that *none* of the federal Takings Clause issues raised by Petitioners in their federal court proceedings were ever precisely raised or decided by the California courts.

The Court has explained that "under collateral estoppel [issue preclusion], once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior action." *Montana v. United States*, 440 U.S. 147, 153 (1979). The Court has not hesitated to deny application of issue preclusion where an issue was not "actually" and "necessarily" determined in the prior proceeding. *Haring*, 462 U.S. at 316. Moreover, issue preclusion doctrine is applicable *only* "when the question upon which the recovery of the second demand depends has under *identical* circumstances and conditions been previously concluded by a judgment" in prior proceedings. *United States v. Moser*, 266 U.S. 236, 241-42 (1924) (emphasis added).

The Ninth Circuit did not assert that the issues whose litigation it precluded had actually been determined in a prior proceeding. Instead, it held merely that the California Supreme Court's determination of the state-law takings claims was "an equivalent determination" of Petitioners' federal Takings Clause claims. Pet. App. 17a. There is no basis under state or federal law for precluding review of a federal issue simply because a previously decided state-law issue is deemed in some sense to be "equivalent."

Indeed, the Ninth Circuit did not cite any California case law in support of its "equivalent determination" standard.[10] Instead, it borrowed that language from a previous Ninth Circuit decision, *Dodd v. Hood River County*, 59 F.3d 852, 863 (1995) ("*Dodd I*"). But *Dodd I* cited no precedent for its "equivalent determination" language, and certainly none deriving from either California law or the law of Oregon (the state from which *Dodd I* arose). It appears that the Ninth Circuit, rather than looking to applicable state law to determine the scope of issue preclusion, has simply crafted its own circuit-wide issue preclusion rule that has the effect of preventing Takings Clause claimants from ever bringing their claims into federal court.

As noted above, all seven California Supreme Court justices were in agreement that Petitioners had not raised, and that the court had not addressed any federal constitutional issues; and that they expected Petitioners to next bring their Takings Claims to federal court. Pet. App. 107a n.1 (majority opinion) ("No federal question has been presented or decided in this case."); *id.* at 170a (Baxter, J., dissenting) ("Plaintiffs have reserved their federal claims and, if rebuffed here, will resume their federal litigation which is now subject to *Pullman* abstention."); *id.* at 194a (Brown, J., dissenting) ("I dissent and hope the plaintiffs find a more receptive forum in the federal courts."). None of the justices gave any indication that they thought that California law governing claim and/or issue preclusion would bar Petitioners from fully litigating their

[10] The only California decision cited by the Ninth Circuit regarding when California courts apply issue preclusion is *Stolz v. Bank of America*, 15 Cal. App. 4th 217, 222 (1993). But as the Ninth Circuit conceded, *Stolz* held that issue preclusion applies only when the issue decided in the prior proceeding is "identical" to the issue arising in the later proceeding. Pet. App. 15a.

Takings Clause claim in federal court. California courts only rarely apply issue preclusion to issues of law, and never do so when the issue of law raised in the second case is not *identical* to the issue of law raised in the first case. *See, e.g., American Continental Ins. Co. v. American Cas. Co.*, 86 Cal. App. 4th 929 (2001).

Moreover, the Ninth Circuit invoked issue preclusion to bar categorically any consideration of the Takings Clause claim, not merely to bar relitigation of specific factual issues decided in an earlier proceeding. The Ninth Circuit invoked issue preclusion in that latter, more limited context in *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir.) ("*Dodd II*"), *cert. denied*, 525 U.S. 923 (1998), an earlier Takings Clause case. *Dodd II* held that the Oregon Supreme Court's factual determination that the landowners retained significant residual value in their property even after new zoning rules were imposed precluded the landowners from seeking to relitigate that factual issue in federal court. *Dodd II*, 136 F.3d at 1227. But *Dodd II* declined an invitation to invoke issue preclusion to bar the landowners' Takings Clause claim based solely on the Oregon courts' denial of the landowners' analogous state-law takings claims; rather, it addressed the Takings Clause claim on the merits. *Id.* at 1229-30. The Ninth Circuit in the decision below went far beyond anything required by *Dodd II* when it applied issue preclusion to bar all consideration of Petitioners' Takings Clause claims.[11]

[11] *Cf. DLX*, 381 F.3d at 523 (Sixth Circuit declines to decide whether *Santini* is correct that issue preclusion is *never* applicable under these circumstances, but nonetheless holds that state court judgment denying state takings claims did *not* collaterally estop plaintiffs from raising Takings Clause claims in federal court, because none of *the factual issues* directly decided in the state court proceedings were

(continued...)

The Ninth Circuit issue preclusion rule not only is contrary to precedent, but does not appear to serve any of the purposes for which courts have crafted the issue preclusion doctrine. Claim and issue preclusion are intended to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources and by preventing inconsistent decisions, encourage reliance on adjudication." *Allen*, 449 U.S. at 94. The Ninth Circuit "equivalent determination" rule does nothing to prevent "inconsistent decisions," because there is no necessary inconsistency between a finding that a state has not violated state takings law and a later finding that the same state action violated the federal Takings Clause. Nor is the rule likely to "conserve judicial resources." In every case, the "equivalent determination" rule will require a federal court to examine closely state court precedents construing state law takings claims and then decide whether those precedents are sufficiently similar to federal court Takings Clause decision to warrant being deemed "equivalent." Under those circumstances, there is simply no sound basis for denying a Takings Clause claimant his day in federal court.

In sum, the issue preclusion rule established by the Ninth Circuit is inconsistent with this Court's precedents, does not appear to derive from the issue preclusion rules of any state, and does not serve any of the purposes underlying issue preclusion doctrine.

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[11](...continued)
relevant to the Takings Clause claims.).

CONCLUSION

Amici curiae request that the Court reverse the judgment below.

Respectfully submitted,

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